93-218

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PETER CRAWFORD, *et alia*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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August 1993

QUESTION PRESENTED

[On April 28, 1993—after five years of consideration including two en banc oral arguments—a deeply, divided U. S. Court of Appeals for the Fourth Circuit issued its decision applying this Court's prior rulings involving union-security agreements.]

I. Whether the Court of Appeals disregarded the rules of pleading and burden of proof enunciated by this Court in *Abood* and *Allen* by refusing to address petitioners' challenges to extra-bargaining unit litigation expenses, such expenses having been held non-chargeable to objecting nonunion employees in this Court's *Ellis* and *Lehnert* decisions.

II. Whether the Court of Appeals disregarded this Court's holding in *Lehnert* that the chargeability of each union expenditure must be made on a *case-by-case analysis* when it failed to address petitioners' challenges to financing the extra-bargaining unit expenditures at Eastern because the district court held that such expenditures at Continental and United were chargeable.

III. Whether the Court of Appeals misconstrued and misapplied the *Lehnert* and *Ellis* tests for determining chargeability of extra-bargaining unit expenses by holding that any such expenditures were chargeable if they may ultimately inure to the benefit of the bargaining unit.

PARTIES TO THE PROCEEDINGS BELOW

In addition to Peter Crawford, the following airline pilots were plaintiff-appellants in the Court of Appeals and are petitioners here: namely, Fredrick J. Adam, Robert F. Bauman, Richard L. Brown, William A. Burbage, Robert Erchak, Ron E. Merzlak; Leroy Rogers, Roger F. Seely, Warren Wells, Dale Cross, Richard Pederson, Clyde B. Smith, Ernest Mueller, Ruel Neeley, Robert Buley, Thomas Giefer, Thomas Klemens, Howard L. Jones, Herbert A. Light, Joseph R. MacKenzie, Michael T. McQuillen, John R. Yotz, Harold Bagnall, Richard P. Barthelemy, Clinton Davis, Edison L. Denny, George Gawrilow, John J. Lumley, Albert Newton, Eugene Palsson, Dale B. Petty, Deryl Roark, Donald D. Ecker, Karl A. Jadrnicek, Howard S. Morton, Richard W. Rew, Donovan Wholers, Donald K. Brewster, Peter Hayes, Laurence J. Stuppy III, and Roger Veon.

The respondent Air Line Pilots Association, International was the only defendant-appellee in the proceedings below.

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Peter Crawford, *et alia* hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review that court's decision and judgment in *Crawford v. Air Line Pilots Association*, 992 F.2d 1295 (4th Cir. 1993).

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals which is the subject of this petition is reported at 992 F.2d 1295, and reprinted in the Appendix hereto at 1a. The prior panel opinion of the Court of Appeals is reported at 870 F.2d 155, and reprinted in the Appendix at 47a. The unreported memorandum opinion of the District Court is reprinted in the Appendix at 60a.

JURISDICTION

The Court of Appeals, sitting *en banc* on petition for rehearing, entered its opinion and judgment on April 28, 1993. This Court, by order dated July 16, 1993, extended the time for filing this petition for certiorari to and including August 10, 1993. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition include the First and Fifth Amendments to the United States Constitution and Sections 2, Fourth and 2, Eleventh of the Railway Labor Act (RLA), as amended, 45 U.S.C. §§ 152, Fourth and 152, Eleventh.

Constitution of the United States

The First Amendment states in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

The Fifth Amendment maintains that "no person shall be * * * deprived of life, liberty, or property, without due process of law * * *." U.S. CONST. amend. V.

Railway Labor Act

Section 2 Fourth provides that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier * * * shall deny or in any way question the right of its employees to join, organize, or assist in

organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, * * * or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wage of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: * * *." 45 U.S.C. § 152 Fourth.

Section 2 Eleventh provides that "Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, * * * or of any State, any carrier * * * and a labor organization * * * authorized to represent employees * * * shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership. * * *." 45 U.S.C. § 152 Eleventh.

STATEMENT OF THE CASE

Factual Background. Petitioners are forty-two nonunion airline pilots who, at the time this litigation commenced, were employed by one of nine airline companies—Eastern, Braniff, Midway, Northwest, Pan American, Trans World, United, USAir and Western[1]—and represented for purposes of collective bargaining by the respondent labor union, the Air Line Pilots Association (ALPA). In 1987, ALPA represented approximately 37,000 pilots at forty-three airlines. Labor relations in the airline industry are governed by the RLA and, pursuant to § 2 Eleventh of the RLA, ALPA had agency shop agreements with twenty-two airlines, including those employing petitioners. Under its agency shop agreements with the various airlines, some 1,400 nonunion pilots were compelled to financially support ALPA by paying an agency fee. The average ALPA represented pilot earned approximately $ 80,000 per year and paid $ 1,880 in dues or agency fees, **not** including assessments. [Stipulate Facts (SF) # 1-5, made part of the district court's opinion and reproduced herein at App. 67a-68a].

ALPA is a large, unitary national labor union and is not composed of local unions like most other labor organizations; all ALPA members belong only to one organization and pay their dues only to ALPA. The union employs a staff of approximately 300 persons, who are organized into 12 separate departments: Representation, Legal, Engineering and Air Safety, Accident Investigation, Legislative Affairs, Communications, Retirement and Insurance, Finance, Office Administration, Information Systems, Human Resources, and Organizing. Additionally, ALPA maintains regional offices throughout the country. [SF # 6-7, App. 68a-69a].

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[1] Since the filing of this lawsuit in 1987, Braniff, Eastern, Midway, Pan Am and Western have gone out of business and TWA is presently in bankruptcy. Of the forty-two petitioners, at least twelve have retired, six have changed airlines, and eight are unemployed because of the union's 1989 sympathy strike at Eastern.

Although ALPA is the exclusive bargaining representative of the pilots at each of the individual airlines, it conducts its day-to-day activities at each airline through a Master Executive Council (MEC) made up of officials elected from Local Councils located at the pilot domiciles within that airline. Each individual MEC (with assistance from the ALPA Staff) is responsible for the day-to-day administration of the ALPA contract with its airline. Each MEC has its own spending authority, *e.g.*, in 1987 the United MEC's spending authority was 2.1 million dollars.

Additionally, each MEC appoints its own negotiating committee who, with the assistance of a professional negotiator employed in ALPA's Representation Department, negotiate any changes to ALPA's agreement with that airline. Although the individual MECs actually negotiate ALPA's collective bargaining activities, they are to a large extent directed and coordinated by its national officers and governing bodies. Broad bargaining goals and policies are established by ALPA's Board of Directors and Executive Board, and are binding on the entire organization. All collective bargaining negotiations and agreements must be approved by its President. [SF # 6-9, App. 68a-70a].

Although they were required to financially support the union as a condition of continued employment, petitioners objected to financially supporting union expenditures that went beyond expenses germane to the negotiation and administration of the collective bargaining agreement executed by their own airline. A brief review of petitioners' long odyssey to obtain relief will put this petition in perspective.

Beginning in 1978, agency fee payers objected to the uses of their agency fees and for the period from 1978 through 1983, ALPA rebated to each objector a percentage of the agency-fee paid, plus interest, based on ALPA's computation of the percentage of its expenditures that ALPA considered to be for political purposes. There were no procedures by which objectors could challenge ALPA's calculations of the amount it considered rebatable. [SF # 19-20, 23; App. 74a-75a]. In 1984, ALPA revised its procedures for calculating agency-fee rebates and established

an interest-bearing escrow account into which it has subsequently deposited a portion of all objectors' agency-fees for each year. ALPA escrowed 150 percent of the amount it estimated would be rebated at the end of any objection year.

In 1983-84, ALPA was involved in a strike at Continental Air Lines and agency fees from pilots at other carriers were used to help fund the strike. Agency fees were also used to help fund ALPA's 1985 strike at United Air Lines.

In October of 1985, because of the financial costs of these strikes, ALPA increased its "dues" (and "agency fees") to 2.35% of gross airline earnings. The additional income was to be used to create a one-hundred million dollar "war chest" or "major contingency fund."

When ALPA paid the 1984 rebate in June of 1986, there was still no procedure by which objectors could challenge the rebate calculations. However, later in 1986, ALPA amended its rebate procedures to allow objectors to challenge the amount of their 1985 agency fee rebate through arbitration. Subsequently, ALPA made arbitration a formal part of its agency fee rebate policy. [SF # 25, App. 75a].

ALPA computed the 1985 rebate based on its total expenditures of $ 50,697,105 and determined that $1,345,497 should be rebated. This figure was then reduced to a percentage of ALPA total expenditures to determine that 2.69% of an objectors agency fees should be rebated. [SF # 32-35, App. 77a-78a]. In making its rebate computations, any expenditures, including expenditures from the "war chest," that ALPA considered germane to collective bargaining **were charged to all agency fee payers, regardless of the airline or airlines involved.**

In September of 1986, ALPA mailed the 1985 agency-fee rebate checks, its Rebate Calculation Report for 1985, and a Cover Letter explaining the rebate and ALPA's newly adopted procedure for challenging the amount of the rebate through arbitration. Copies of the 1985 Rebate Report and the ALPA

cover letter explaining the rebate and its new procedures **were only mailed to those 240 agency fee payers who were already aware of their rights and had filed objections to the 1985 agency fee**. [SF # 37, App. 78a]. The other 1,160 agency fee payers, including 16 petitioners, were not advised of ALPA's new procedures for objecting and challenging the amount of their agency fee.

Although the 1985 Rebate Report mailed to the objecting agency fee payers explained the basis for ALPA's determination that 2.69% of fees was rebatable, it did not contain sufficient information for objectors to determine why they were required to pay the other 97.3% of their agency fees. For example, the 1985 Report stated that over $ 27,000,000 was expended in 1985 for negotiations but failed to provide a breakdown as to how much was spent in negotiations at each airline. The 1985 report also failed to inform objectors that ALPA had given $ 1,100,000 to another union, the Association of Flight Attendants (AFA), for its support during the United strike.

Additionally, the 1985 rebate report failed to provide either the total amount of litigation expenses or a breakdown of which litigation affected which bargaining units. The report simply stated:

> ALPA reviewed its litigation and representational expenses in 1985 on a case-by-case basis and determined that $ 7,488 of its total litigation expenses is rebatable. This amount represents the costs associated with several cases brought in conjunction with ALPA's attempt to organize non-union pilots at one airline, because the law deems organizing expenses to be rebatable.

Fifteen of the 1985 objectors, including twelve of the petitioners, requested arbitration of ALPA's computation of the 1985 rebate. This arbitration was finally held in August 1987—some 32 months after ALPA began collecting its 1985 agency fees. The arbitration was adjourned because of the imminent filing of this lawsuit. [SF # 39-40, App. 78a-79a].

On September 3, 1987, plaintiffs commenced the present lawsuit alleging:

1) that ALPA's agency shop agreements were unenforceable because the union had failed to establish the necessary constitutional safeguards and protections articulated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (advanced reduction of nonchargeable expenses, adequate explanation of the basis for the fee, and a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker); and

2) that ALPA was violating the RLA by conditioning plaintiffs' continued employment upon financial support of union activities outside their individual bargaining units and by compelling them to contribute funds to the union's one-hundred million dollar "war chest."

After the suit was filed, ALPA computed its 1986 rebate and determined that 3.39% of its 1986 expenditures were rebatable. Additionally, ALPA amended its Rebate Procedures to provide the necessary *Hudson* procedural safeguards commencing in May of 1988. In December of 1987, ALPA mailed a copy of the 1986 rebate report and the new procedures, to **all** agency fee payers, not just those who had filed objections. [SF # 46, App. 80a].

Although the 1986 Rebate report contained far more detail than any previous rebate report, it failed to provide an airline by airline breakdown of expenditures. And, although the 1986 report detailed **$** 1,022,167 in Continental Air Lines Strike Litigation and another **$** 888,759 in General Litigation, ALPA stated that it "reviewed its litigation and representational expenses in 1986 on a case-by-case basis and determined that **none** of its total litigation expenses are rebatable."

Arbitration of the 1986 rebate calculations were stayed pending resolution of this litigation.

As previously noted, in October 1985 ALPA increased its dues (and agency fees) from 1.35% to 2.35% of airline income to create a "contingency fund" or War "chest." The record at the district court showed that through November 1987, ALPA had expended over $ 22 million from the fund including: $ 1,100,000 in support to another union during the United strike, $ 3,695,908 in legal/professional support of the Continental strike, and over $ 3,600,000 in strike preparations at Eastern. [Compl. Ex. B, SF # 16-18, App. 73a-74a]. In 1989, while this case was on appeal, ALPA conducted a nine-month sympathy strike at Eastern which was financed from the contingency fund.

Procedural History.

District Court. As previously noted, on September 3, 1987, the petitioners filed a class action complaint on behalf of themselves and 1,400 other non-union pilots seeking declaratory and equitable relief against ALPA.[2] The district court moved the case with great dispatch. Class certification was denied and a one-day non-jury trial was held on March 15, 1988. The parties had filed extensive pretrial "Stipulations of Fact" [App. 67a-82a], and the court heard live testimony from three "typical" plaintiffs and two ALPA officials (its President and Director of Finance). The court also received into evidence 49 exhibits tendered by the plaintiffs and 35 exhibits tendered by the defendant. Following the filing of post-trial briefs, the court issued its opinion on March 25, 1988 [App. 60a-66a].

As to the pilots claims that ALPA's 1985 and 1986 rebate procedures did not comply with *Hudson*, the district court found that

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[2] Petitioners sought to enjoin ALPA from enforcing its agency shops until it had established the necessary Hudson safeguards. Additionally, petitioners sought restitution of all agency fees collected in violation of their constitutional and statutory rights.

> "the procedures for the year 1987 are well within the requirements of *Hudson*, and the procedures for the year 1986 substantially within them. For the years prior to 1985 there may have been deficiencies; however, no specific damage to any plaintiff as a result of any deficiency in the rebate program itself has been shown, and the court is unwilling to require an audit, notice, or an opportunity to object on the possibility that there may be revealed some inappropriate expenditures warranting additional rebates." [App. 62a].

The district court also rejected petitioners' claims that under the "chargeability test" enunciated by this Court in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), objecting nonunion pilots could **not** be required to support ALPA's strike activities at other bargaining units (airlines) or to contributed to ALPA's 100 million dollar "war chest." In the district court's view, since all pilots throughout the industry, both union and nonunion, benefited from ALPA's strikes against Continental and United, objecting nonunion employees at other airlines could lawfully be compelled to financially support ALPA's efforts. The district court did not address the strike preparation expenditures at Eastern Air Lines.

The district court also found that since the United and Continental strikes had considerably weakened ALPA's financial position—thereby making it vulnerable to a prolonged strike—objecting nonunion employees could lawfully be required to contribute to the "contingency fund" because it was a "device reasonably employed to implement the duties of the union as exclusive representative." [App. 65a].

Accordingly, the district court entered judgment in favor of ALPA and dismissed petitioners' claims. Petitioners appealed.

Proceedings Before A Panel Of The Fourth Circuit. On appeal, petitioners argued *inter alia* that **before** a union could lawfully compel nonmembers to financially support its activities, it had to have established the necessary pre-collection safeguards enunciated in *Hudson*. In support of this claim, petitioners pointed out numerous *Hudson* violations, including the fact that the 1985 Rebate Report which spawned this litigation was only distributed to those agency fee payers who were aware of their rights and had already filed objections. ALPA's failure to provide the other 1,160 agency fee payers, including 16 petitioners, with sufficient information to judge the appropriateness of fee violated the *Hudson* adequate notice requirement.[3]

Petitioners also challenged the district court's broad construction of *Ellis* to permit ALPA to finance its strike activities in one bargaining unit (airline) with agency fees from objecting nonunion pilots in another bargaining unit (airline). Petitioners argued that such a construction was inconsistent with both the plain reading of the *Ellis* chargeability test and this Court's application of that test to "organizing" and "extra-unit litigation" expenditures.

Similarly, petitioners challenged the district court's holding that the *Ellis* test sanctioned compulsory financial support of the "contingency fund" to ensure ALPA's continued bargaining power. Petitioners pointed out that the intent of Congress in enacting RLA § 2, Eleventh was to prevent "free-riders,"[4] and

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[3] "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the **potential** objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive the information—does not adequately protect the careful distinctions drawn in *Abood*." *Hudson*, 475 U.S., at 306

[4] In *Ellis*, the Court reiterated that "Congress' essential justification for authorizing the union shop was the desire to eliminate free

(continued...)

that the legislative history specifically rejected the notion that § 2, Eleventh was being enacted to strengthen the union "bargaining power."

On December 5, 1988, a panel made up of Chief Judge Ervin, Senior Circuit Judge Butzner, and District Court Judge Howard (D. Md.) heard oral arguments. On March 17, 1989, Judge Butzner issued the panel's decision affirming the district court.

Petitioners sought rehearing and rehearing *en banc* urging that the panel had misconstrued and misapplied the *Hudson* and *Ellis* decisions to the case at bar.

***En Banc* Proceedings Before The Fourth Circuit.** The Fourth Circuit granted rehearing *en banc* in May of 1989 and heard oral arguments on October 3, 1989. However, after this Court granted *certiorari* in *Lehnert v. Ferris Faculty Ass'n.*, 881 F.2d 1388 (6th Cir. 1989), the Fourth Circuit deferred its *en banc* decision pending a decision in *Lehnert*. After *Lehnert* was decided, 111 S.Ct. 1950 (1950), the Fourth Circuit requested supplemental briefs and heard reargument *en banc* in February of 1992. On April 28, 1993, a deeply, divided Fourth Circuit issued its decision affirming the district court. The court split 6-1-5, with Senior Circuit Judge Butzner writing the opinion of the court. [992 F.2d 1295, App. 1a].

As to petitioners' claims that ALPA's 1985 and 1986 rebate system did not comply with *Hudson*, the court after noting that ALPA's present procedures were not being challenged, affirmed the district court's holding that "the challenged plans substantially complied with *Hudson* and that [petitioners] had proved no damages arising out of delay or minor procedural deficiencies."

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[4](...continued)

riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refuse to contribute to the costs thereof." 466 U.S., at 447.

[*Id.* at 1302, App. 12a]. While petitioners disagree, they do not believe that the holding warrants review by this Court.

Petitioners do, however, seek review of the Fourth Circuit's holdings on their *Ellis* claims. Petitioners assert that the six-judge majority misapplied this Court's *Lehnert* decision when it held that objecting agency-fee payers could be charged for their pro rata share of the union's: (1) extra-unit strike activities, and (2) costs incurred by the major contingency fund for extra-unit activities. [*Id.* at 1301, App. 10a]. Additionally, petitioners submit that the majority erred in refusing to address petitioners' challenges to extra-unit litigation expenses allegedly because they had not been properly presented and preserved below.

Circuit Judge Wilkinson (joined by Judge Wilkins of the majority), concurred in judgment on the grounds that this Court's *Lehnert* decision compelled such a result. [*Id. at 1302*, App. 12a].

In his 31-page dissent, Circuit Judge Russell writing for the five dissenting Judges, pointed out that the majority had erred:

(1) by not addressing the challenges to extra-unit litigation expenditures even though petitioners had satisfied the necessary pleading requirements of *Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977) and *Railway Clerks v. Allen*, 373 U.S. 113, 118 (1963), and the issue had been argued on appeal;

(2) by not analyzing challenges to the expenditures for the Eastern strike on a case-by-case basis as required by *Lehnert*; and

(3) by misapplying this Court's test for determining extra-unit expenditures as enunciated in *Lehnert*.

Petitioners contend that the five-dissenting judges properly interpreted and applied this Court's precedents and that the majority and concurring opinions are in error.

REASONS FOR GRANTING THE WRIT

For almost forty years, nonunion employees covered by the RLA have been seeking guidance on their rights and obligations *viz-a-viz* the unions that serve as their exclusive bargaining representatives. Despite numerous decisions regarding the application and scope of RLA union-security agreements, *see e.g. Railway Employes Department v. Hanson*, 351 U.S. 225 (1956); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); and *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), RLA unions and nonunion employees have been unable to develop a workable formula for determining what categories of union expenditures are chargeable to objecting nonunion employees. This issue of determining the proper "chargeability" test has also divided this court. *Compare* Justice Blackmun's three-prong "germane to collective bargaining" test, *Lehnert*, 111 S.Ct. at 1959, with Justice Scalia's "statutory duties" test, *id.* at 1979 (Scalia, J., dissenting).

As the present case clearly demonstrates, the lower courts and the interested parties need further clarification and guidance from this Court, especially in regard to the proper test for determining the "chargeability" of "extra-unit" expenditures. Given the current labor unrest in the transportation industry, the recent changes in the Court's composition, and the parties compelling need for clarification, petitioners submit that this RLA case provides an appropriate vehicle for reconsidering the appropriateness of adopting Justice Scalia's "statutory duties" test ("a union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.") *Id.*[5] Petitioners submit that

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[5] Petitioners attempted to have the *en banc* Fourth Circuit adopt this test, but it properly declined on the grounds that only this Court may overrule one of its precedents, 992 F.2d at 1303, App. 14a (Wilkinson, J., concurring).

adoption of such a test would go along way toward solving the "chargeability" issue.

I Petitioners Fully Support And Adopt The Dissenting Opinion And Submit That Its Reasoning Justifies Review.

In seeking review by this Court, petitioners rely heavily on the arguments and rationales contained in Circuit Judge Russell's extensive, detailed analysis of the issues in this case, as well as his detailed recitation of the errors contained in the majority and concurring opinions. Petitioners adopt by reference all of the dissent's arguments for they clearly demonstrate why review by this Court is appropriate. *See* 992 F.2d 1303-18 (Russell, J., dissenting). The following comments are meant to supplement the reasons articulated by Judge Russell.

II The Court Of Appeals Misconstrued This Court's Test For Determining "Chargeability" Of "Extra-Unit" Expenditures.

The court below affirmed the district court's holding that ALPA's Continental and United strike expenditures were chargeable to objecting employees because in its view, there was "some indication that the payment [was] for services that may ultimately enure to the members of the local union by virtue of their membership in the parent organization." By so doing, both the majority and concurring opinions misconstrued and misapplied this Court's standard for determining chargeability.

As Judge Russell correctly points out, the standard adopted by the court below is fundamentally different from the standard adopted by this court, namely that the validity of charges assessed against dissenters must be "germane" to the collective bargaining of the dissenter's unit. *See, e.g., Communications Workers v. Beck*, 487 U.S. 735, 745 (1988); *Ellis*, 466 U.S. at 448; *Abood*, 431 U.S. at 236; *Allen*, 373 U.S. at 121. *Lehnert*, 111 S.Ct. at 1959, and would lead to wildly different results.

Rather than utilizing the "germane to collective bargaining" test, the court below appears to adopt a standard that extra-unit expenses are chargeable if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." As Judge Russell points out, the problem with this standard is that extra-unit organization and extra-unit litigation expenses, for example, would become chargeable, even though this Court has held them to be nonchargeable under the germane test. The conflicting standard adopted by the court below is in error and will tend to further confuse chargeability analysis if allowed to stand.

Whatever the appropriate test for determining the chargeability of the Continental and United strike expenditures, petitioners submit that ALPA's extra-unit donation of $ 1,100,000 to another union participating in the United strike can never be chargeable to objecting employees. *Lehnert*, 111 S.Ct. at 1961 (Union does not have carte blanche to expend dissenters' funds and may not charge objecting employees for a direct donation to an unrelated bargaining unit); *Beck v. Communications Workers*, 776 F.2d 1187, 1212 (4th Cir. 1985)(cannot charge nonunion employees for expenditures in support of a strike by another union). Clearly, the courts below were in error in holding that such donations were chargeable to petitioners.

III The Court Of Appeals Failure To Determine "Chargeability" On A *Case-By-Case* Basis Compels Petitioners To Financially Support Union Activities Without The Union Having Met Its Burden Of Proof.

The Court of Appeals erred in upholding the chargeability of ALPA's "extra-unit" expenditures in support of Eastern strike activity, i.e. 1986-87 strike preparations and the 1989 sympathy strike in support of another union. Under this court's precedents, these challenged expenditures were not chargeable because the union failed to present any evidence or proof that such expenditures were germane to collective bargaining. As Judge

Russell's dissent makes clear, the union bears the burden of proof regarding chargeability of challenged expenditures, *Abood*, 431 U.S. at 239 n. 40; *Allen*, 373 U.S. at 122, and the chargeability of each expenditure is to be determined on a case-by-case basis, *Lehnert*, 111 S.Ct. at 1959. Instead of addressing the chargeability of the challenged Eastern expenditures, the court below relied upon the district court's findings that "support for the striking pilots [in the industry] was of crucial importance in establishing the union's bargaining position in each airline unit." By failing to analyze the chargeability of the challenged Eastern expenditures, the court below effectively relieved ALPA of its burden of proof.

Also, as Judge Russell points out, ALPA's extra-unit expenditures for the Eastern sympathy strike in support of another union were most likely impermissible as a matter of constitutional and statutory law. 992 F.2 at 1305, App. 19a.

The failure of the courts below to follow this Court's precedents and require ALPA to meet its burden of proof warrants review by this Court.

IV The Court Of Appeals Failure To Address Petitioners' Challenges To "Extra-Unit" Litigation Expenditures Conflicts With This Court's Holdings On The Rules Of Pleading And Burden Of Proof In Agency Fee Cases.

The courts below erred in failing to address petitioners' challenges to extra-unit litigation expenditures. The majority avoided the issue by holding the issue was not raised in the complaint, stipulation of facts, or in the district court's findings. Therefore, the issue had not been presented or preserved. 992 F.2d 1301, App. 10a. While it is true that extra-unit litigation was not named as one of the challenged expenditures, it was an integral part of those expenditures and the parties to the litigation believe that it was an issue. Even the majority concedes that it was extensively briefed during the appeal.

As Judge Russell correctly points out in his dissent:

> "*Allen* and *Abood* establish that to put in issue the validity of charges by the union against dissenting employees under an agency bargaining contract, dissenters are not required to identify the specific expenditures to which they object; it is only necessary that they allege generally that they oppose being charged for "expenditures of any sort" that are impermissible. *Abood*, 431 U.S. at 241; *Allen*, 373 U.S. at 118. Such an allegation puts in issue all the charges made by the union in the case and places on the union the burden of showing that such charges were proper. *Abood*, 431 U.S. at 239 n.40; *Allen*, 373 U.S. at 122; *see also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 & n.16 (1986); *Beck v. Communications Workers*, 776 F.2d 1187, 1209 (4th Cir. 1985), *aff'd*, 487 U.S. 735 (1988).
>
> "Plaintiffs here stated in their complaint that they objected to any charges by the union that were impermissible under RLA § 2 Eleventh, 45 U.S.C. § 152 Eleventh. In addition, with regard to the charges for litigation in connection with the United and Continental strikes, they made more than a general objection because they expressly opposed in their complaint the union's charges for the expenses for United and Continental strikes, and the litigation expenses were part of expenses charged for the strikes. Plaintiffs, therefore, clearly exceeded the requirements set forth in *Abood* and *Allen* to put in issue the validity of the union's charges for these litigation expenses."

992 F.2d at 1304, App. 16a.

As this Court's decisions make abundantly clear, extra-unit litigation expenditures are not chargeable to objecting nonunion employees. *Ellis*, 466 U.S. at 453; *Lehnert*, 111 S.Ct. at 1964; *see also Pilot Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123 (10th Cir. 1991). There can be no doubt that petitioners were objecting employees challenging the chargeability of expenditures from ALPA's major contingency fund. It is also clear that portions of the fund expenditures involved litigation. For example, over $ 3,000,000 (70%) of the challenged

Continental expenditures involved legal/professional fees. See Compl. Ex B. Given the fact that such expenditures are nonchargeable, the Court below erred in failing to address petitioners challenges.

CONCLUSION

For the foregoing reasons and those listed in Judge Russell's dissent, the petition should be granted and a writ of certiorari issued to the U. S. Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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August 10, 1993

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

April 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETER CRAWFORD; FREDERICK J. ADAM; ROBERT F. BRAUMAN; RICHARD L. BROWN; WILLIAM A. BURBAGE; ROBERT ERCHAK; RON E. MERZLAK; LEROY ROGERS; ROGER F. SEELY; WARREN WELLS; DALE CROSS; RICHARD PEDERSON; CLYDE B. SMITH; ERNEST MUELLER; RUEL NEELEY; ROBERT BULEY; THOMAS GIEFER; KLEMENS THOMAS; HOWARD L. JONES; HERBERT A. LIGHT; JOSEPH R. MACKENSIE; MICHAEL T. MCQUILLEN; JOHN R. YOTZ; HAROLD BAGNALL; RICHARD P. BARTHELEMY; CLINTON DAVIS; EDISON L. DENNEY; GEORGE GAWRILOW; JOHN J. LUMLEY; ALBERT NEWTON; EUGENE PALSSON; DALE B. PETTY; DERYL ROARK; DONALD D. ECKER; KARL A. JADRNICEK; HOWARD S. MORTON; RICHARD W. REW; DONOVAN WHOLERS; DONALD K. BREWSTER; PETER HAYES; LAURENCE J. STUPPY, III; ROGER VEON,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Defendant-Appellee.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,

Amicus Curiae.

No. 88-2083

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-87-891-A)

Argued: February 4, 1992

Decided: April 28, 1993

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Butzner wrote the majority opinion, in which Chief Judge Ervin, Judge Hall, Judge Phillips, Judge Murnaghan, and Judge Wilkins joined. Judge Wilkinson wrote a concurring opinion, in which Judge Wilkins joined. Judge Russell wrote a dissenting opinion, in which Judge Widener, Judge Niemeyer, Judge Hamilton, and Judge Luttig joined.

* * * *

OPINION

BUTZNER, Senior Circuit Judge:

Appellants are forty-two nonunion airline pilots employed by one of eight airline companies—Eastern, Braniff, Midway, Northwest, Pan American, United, Western, or USAir—operating under the labor scheme of the federal Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* *See* 45 U.S.C. § 181 (air carriers regulated under the Act). Each of the airlines had an agreement with the Air Line Pilots Association (ALPA) (appellees), designating it as exclusive bargaining representative for the pilots employed by that airline. Under the authority of § 2, Eleventh, of the RLA, the agreement required pilots employed by the

airlines either to join ALPA or to remit to ALPA an agency fee in lieu of dues to compensate it for its services in bargaining and representation. 45 U.S.C. § 152, Eleventh (a). The nonunion pilots contend that ALPA's expenditures of exacted funds violated their rights under the RLA and the First and Fifth Amendments. They also charge that ALPA's methods of collecting and accounting for agency fees exacted under these agreements violated the procedural requirements of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

The district court entered judgment for ALPA. A panel of this court affirmed in *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155 (4th Cir. 1989). The court subsequently granted rehearing *en banc*. Thereafter, while the case was pending, the Supreme Court granted certiorari in a public-sector union case involving somewhat similar issues. *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990). This court then held its decision in abeyance pending the Supreme Court's decision in *Lehnert*. After that decision, *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991), we requested supplementary briefs. Following receipt of the briefs, the case was argued before the full court, which now affirms the judgment of the district court.

I

The parties entered into a lengthy stipulation of facts before trial, and the district court augmented these with detailed findings of fact in its opinion. We review these findings for clear error. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. at 1965; *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

The stipulation discloses that ALPA during the relevant period represented some 37,000 pilots at 43 airline companies, of whom 34,500 were members of ALPA. ALPA charges its members dues of 2.35 percent of their gross pay. The average ALPA member made $80,000 annually and paid $1,880 in union dues. ALPA is a unitary national labor organization that is not composed of local unions like most other labor organizations.

Members' dues go to ALPA directly, and collective bargaining and negotiating policy are directed by the national officers and governing bodies of ALPA, with the assistance of the union's 300-member national staff. The pilots employed at each airline with a union contract elect a Master Executive Council for that airline, and negotiations affecting that airline's collective bargaining agreement are conducted by a committee appointed by the Master Executive Council, assisted by the ALPA staff. Negotiating strategy, and any agreement reached, must be approved by ALPA's national president.

Continental Air Lines in 1983 filed for bankruptcy and sought to abrogate its collective bargaining agreement with ALPA. Continental pilots responded by striking. ALPA members in other airlines by secret ballot repeatedly approved a special assessment to their dues to pay a monthly benefit to the striking Continental pilots, and these benefits were paid until February 1986. In 1985, United Air Lines entered negotiations with its pilots seeking a two-tier wage structure or "B-scale" that would pay newly hired pilots less than those already employed. ALPA resisted this demand, and a strike ensued. Eventually the parties signed a contract granting United a temporary B-scale to end in five years, with binding arbitration to determine its form thereafter. After this agreement, ALPA won similar agreements from other airlines, whose pilots it represented, seeking to impose B-scales.

The disputes with Continental and United weakened ALPA financially. In October 1985, ALPA's membership approved an increase in their dues to create a major contingency fund to be used in important labor disputes or for other expenditures that could not be funded adequately out of the normal budget. Funds were used to support the strikes at Continental and United and were used to prepare for a possible strike at Eastern Air Lines. Some funds were also used for the expense of union organizing drives. These organizing expenses, ALPA agrees, are not chargeable to nonunion agency fee payers.

The district court supplemented the stipulation by findings of fact and inferences that it reasonably drew from the facts, all of which are amply supported by the evidence. We quote the findings at some length, because they are essential to an understanding of why ALPA's expenditures are germane to collective bargaining with all the airlines whose pilots it represents.

> [C]ollective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some cost-cutting concession from ALPA, other airlines generally seek to obtain the same or an equivalent concession. On the other hand, when ALPA succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.

Because of this industry pattern, the court found,

> it was important to ALPA, in the interest of all the pilots which it represented, to ensure that what had happened at Continental, namely, a bankruptcy whereby the collective bargaining agreement was abrogated and pilots' salaries were cut in half, not become an industry norm to be sought by other airlines in the bargaining process. For this reason it was in the interest of all pilots, members and nonmembers alike, that ALPA used its funds to pay the pilots at Continental to make up for their lost wages.

The court further found that

> in 1985, United sought in bargaining to impose a concession which American Airlines had achieved [with another union], namely, a B-Scale two-tier payment arrangement under which airline cockpit personnel

> hired after a certain date would be paid on a lower pay scale (the B-Scale). ALPA supported financially the pilots who struck United, and ultimately, after a twenty-nine day strike, secured from United a six-year parity requirement under the B-Scale arrangement. This accomplishment has been used to benefit all members (and non-members) in all the airlines, not just those employed by United.

In its discussion of the major contingency fund, the court found that

> [t]he United and Continental strikes considerably weakened ALPA's financial stability. Since a financially weak ALPA was vulnerable to a prolonged strike, ALPA lost its credibility with management because the other airlines knew it could not financially sustain a long strike. For this reason, the Major Contingency Fund was created.... It was from this fund that some expenditures, beginning in 1985, were made to support the striking pilots at Continental and United. Plaintiffs attack the fund as an improper expenditure of the dues of the objecting plaintiffs. Again the court finds the creation of the fund to be a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.

II

The principal complaint of the objecting nonunion pilots concerns ALPA's use of their agency fees to support strikes and other activities of bargaining units at airlines where they are not employed. Closely related is their complaint that ALPA used their agency fees to support the major contingency fund. The nonunion pilots assert that use of agency fees for expenses related to bargaining outside the unit at the airline where a pilot works violates both the Railway Labor Act and their constitutionally protected rights of free association.

Section 2, Eleventh of the Railway Labor Act provides that egulated carriers and unions may agree that "as a condition of ontinued employment, ... all employees shall become members f the labor organization representing their craft and class." 45 J.S.C. § 152, Eleventh (a). This provision was added to the LA in 1951. Five years later, the Supreme Court sustained the gency-fee provisions of the RLA against attack on their facial onstitutionality under the First and Fifth Amendments. *ailway Employees Dep't v. Hanson*, 351 U.S. 225, 238 (1956). t the same time, it found that the requirement that unwilling orkers pay agency fees to the union might under other ircumstances pose a constitutional problem, since the enact- ent of § 2, Eleventh is "the governmental action on which the onstitution operates, though it takes a private agreement to voke the federal sanction." *Hanson*, 351 U.S. at 232.

The intrusion into individual freedom of choice is justified y Congress' desire to ensure "[i]ndustrial peace along the rteries of commerce," *Hanson*, 351 U.S. at 233, and by the eed to reduce labor friction through "the elimination of the free riders'—those employees who obtained the benefits of the nions' participation in the machinery of the Act without inancially supporting the unions." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 761-62 (1961). However, the LA does not give "unions, over an employee's objection, the ower to use his exacted funds to support political causes which e opposes." *Street*, 367 U.S. at 768-69 (footnote omitted).

Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991), oncerned not a carrier regulated by the RLA but a public- mployee union exacting agency fees pursuant to a state statute. owever, "[b]ecause the Court expressly has interpreted the LA 'to avoid serious doubt of [the statute's] constitutionality,' he RLA cases necessarily provide some guidance regarding vhat the First Amendment will countenance in the realm of nion support of political activities through mandatory assess- ents." *Lehnert*, 111 S. Ct. at 1957 (citations omitted). Examining the prior cases, the Court deduced that the constitu-

tionally or "challenged" agency-fee expenditures must be measured against a three-part test. Chargeable activities must

> (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

111 S. Ct. at 1959.

Applying these principles, the Court specifically rejected the agency-fee objectors' contention that the "local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." The Court found this contention "to be foreclosed by our prior decisions." 111 S. Ct. at 1959. To require that expenses concern the specific bargaining unit "would be to ignore the unified-membership structure under which many unions, including those here, operate." 111 S.Ct at 1961. Under this structure, "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S. Ct. at 1961.

The Court recognized limitations on the union's power to spend exacted fees for bargaining activities unrelated to the bargaining unit: the Constitution bars "a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," as well as a "contribution by a local union to its parent" that is "in the nature of a charitable donation." 111 S. Ct. at 1961. Nevertheless, extra-unit bargaining expenditures are legitimate

if there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." 111 S. Ct. at 1961-62. Among the expenditures approved by the *Lehnert* Court in this context were funds used to prepare for a potential strike. The Court upheld the district court's findings that such preparations are "reasonable bargaining tools." 111 S. Ct. at 1965.

The holding in *Lehnert*, read in conjunction with the district court's extensive findings of fact, makes the union's case for the challenged expenditures, if anything, stronger than it had been under previous precedent. ALPA's "unified-membership structure," 111 S. Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargaining process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent the extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position in each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargaining pattern and practice in the airline industry.

III

Appellants attempt to challenge the use of their fees for the major contingency fund as an "involuntary loan." While the *Lehnert* Court cautioned in dictum that exacted funds could not be used for an "interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally," 111 S. Ct. at 1961, the ALPA fund does not match that description. The fund is, in the findings of the district court, "a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit." Like the payments to the national union approved in *Lehnert*, the fund "contributes to the pool of

resources potentially available to the local" and thus "is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." 111 S. Ct. at 1961. Here, the purposes for which the fund was created were, by finding of the district court, germane to collective bargaining. As they were designed to further the union's duty of representation, they were by definition justified by the policies underlying the RLA. Finally, we do not believe that the burden to constitutional rights imposed by permissible exaction of fees is heightened simply because the funds are assessed in advance of labor actions rather than contemporaneously or afterwards.

Accordingly, applying the test enunciated by the Court in *Lehnert*, we hold that a pro rata share of strike support benefits for pilots in other bargaining units and of the pro rata cost of the major contingency fund may be charged to objecting agency-fee payers. *Accord Pilots Against Illegal Dues v. Airline Pilots Ass'n.*, 938 F.2d 1123, 1131 (10th Cir. 1991).

In their supplemental briefs, both parties debate the implications of *Lehnert* for litigation expenses. However, nowhere in appellants' complaint, the stipulations of fact, or the district court's findings is there any mention of extra-unit litigation expenses in this case. The issue simply has not been properly presented and preserved below, and therefore we express no view about it. *See United States v. One 1971 Mercedes Benz*, 542 F.2d 912, 915 (4th Cir. 1976).

IV

The appellants also complain that 1985 and 1986 rebate system for agency fees did not comply with the requirements imposed by *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986). They do not complain about the current rebate system. *Hudson* holds that union procedures for accounting and rebate or advance reduction of agency fees must "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an

impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

Pointing out that *Hudson* dealt with a public employer and public employees, ALPA contends that state action and consequent applicability of the First Amendment are not involved in this case, because airline transportation is a private industry. Supporting this thesis with recent Supreme Court decisions that deny the applicability of the state action doctrine to private transactions, ALPA asserts that the procedures required by *Hudson* do not apply to private collective bargaining agreements.

We cannot accept ALPA's position. It is squarely rebutted by *Hanson*, 351 U.S. at 232, and we do not agree that the Supreme Court has implicitly overruled *Hanson*. ALPA must, and now does, provide nonunion pilots the same procedural protection required by *Hudson*.

From 1978 until 1983, ALPA rebated to each nonunion agency fee payer who objected to use of agency fees for political purposes a percentage of the fee paid, plus interest, based on ALPA's computation of the percentage of its total expenditures that were used for political purposes. ALPA revised its rebate procedures after the Supreme Court decided *Ellis v. Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984). The new procedures, designed to conform to *Ellis*, established an interest-bearing escrow account into which ALPA deposited 150 percent of the amount it estimated would be rebatable at the end of the relevant year. In 1986, after the Supreme Court's decision in *Hudson*, ALPA set up a procedure by which dissenting agency fee payers could seek arbitration of disputes about the proper amount of rebates. ALPA pays the expense of arbitration. By mutual agreement, arbitration for years since 1985 has been stayed pending this litigation.

In November 1987, ALPA granted agency fee payers an option to receive either an advance reduction of their dues or a rebate with interest from the escrow account. In December

1987, a summary and explanation of the 1986 rebate system was sent to all agency fee payers. Previously, such information had been sent only to agency fee payers who had objected to use of their fees for nonchargeable expenses.

The district court held that appellants' claims were barred by the statute of limitations; however, the court also found that

> the procedures for the year 1987 are well within the requirements of *Hudson*, and the procedures for the year 1986 substantially within them. For the years prior to 1985 there may have been deficiencies; however, no specific damage to any plaintiff as a result of any deficiency in the rebate program itself has been shown, and the court is unwilling to require an audit, notice, or an opportunity to object on the possibility that there may be revealed some inappropriate expenditures warranting additional rebates.

A panel of this court held that the appellants' claims were not time-barred. For reasons stated in its opinion, we affirm that ruling. *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 159 (4th Cir. 1989). The panel affirmed the alternative holding of the district court that the challenged plans substantially complied with *Hudson* and that appellants had proved no damages arising out of delay or minor procedural deficiencies. With respect to the procedural aspect of the rebate system, we affirm the district court for reasons stated in the panel opinion. *See Crawford*, 870 F.2d at 159-61.

AFFIRMED

WILKINSON, Circuit Judge, concurring:

I vote to affirm the district court's judgment because I believe that we are required by *Lehnert v. Ferris Faculty Association*, 111 S. Ct. 1950 (1991), to do so. Judges are in the business of taking language seriously, and the language in *Lehnert* nails the result here to the mast.

In *Lehnert*, a majority of the Supreme Court held that non-ideological expenses may be chargeable to union dissenters even in the absence of "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Id.* at 1961. Although *Lehnert* does not "grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit," *id.*, all that is required is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization," *id.* at 1961-62; *see also id.* at 1981 (Scalia, J., concurring in the judgment in part and dissenting in part) approving a pooling arrangement because "[i]t is a tangible benefit" to a bargaining unit to have "services on call, even in the years when they are not used" by that unit).

Because ALPA's strike reserve fund was potentially available for the benefit of pilots at every bargaining unit, payments for creation and maintenance of the fund "may ultimately enure to the benefit" of pilots at each bargaining unit and therefore the fund passes muster under *Lehnert*. The strike reserve fund is a pooling arrangement into which pilots, both union and non-union, at the various airlines with which ALPA has agency shop agreements pay a certain percentage of their airline salaries. The fund is intended to be used for major labor disputes and for other expenditures that cannot be funded through ALPA's normal budgeting practices and policies. It is potentially available for the benefit of pilots, including non-members, at all airlines. *Lehnert* approved such pooling arrangements and made clear that pooled funds need not directly benefit any particular bargaining unit in any given year. Moreover, in *Lehnert* the Court held that strike-preparation activities—such as ALPA's strike reserve fund—are adjuncts to the bargaining process and are therefore chargeable to union dissenters. *See* 111 S. Ct. at 1965-66; *id.* at 1981 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Likewise, I must conclude that the expenditures in support of the United and Continental strikes, and in preparation for a

possible Eastern strike, are chargeable under *Lehnert*. In this case, as Judge Butzner notes, the district court made detailed and exhaustive factual findings. Based on these findings, it concluded that "collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines." These factual findings—which are not clearly erroneous and which are similar to the conclusions of other courts, *see Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1128 (10th Cir. 1991)—compel me to conclude that there is "some indication" that these expenditures "may ultimately enure to the benefit" of pilots at airlines other than Continental, United, and Eastern.[1]

Plaintiffs have been candid before this court. They recognize that *Lehnert* is anything but a favorable case for their position. Included in their supplemental brief is a chart of the Justices' various positions on the different issues presented in that case. Plaintiffs note "the deeply divided court" that decided *Lehnert* and "the retirement of Justice Marshall," and invite us to adopt the position of the *Lehnert* dissent. That is not an invitation, however, that a court of appeals judge can accept. *See Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (noting that lower courts should follow a precedent with "direct application in a case" and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions"); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (*per curiam*) ("Needless to say, only this Court may overrule one of its precedents.").[2]

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[1] The direct impact of bargaining at one airline on bargaining at other airlines may be the result both of the somewhat unique organizational structure of ALPA and of the national nature of the industry. In cases involving other industries and other unions, therefore, such a factual finding may not be present. In such circumstances, of course, application of *Lehnert* may very well result in a different outcome.

[2] Plaintiffs also suggest that, while *Lehnert* may govern constitutional challenges to agency fees, we should adopt the *Lehnert* dissent as the proper interpretation of Railway Labor Act (RLA) §2, Eleventh, 45 U.S.C. §152,

The charged expenses here were not ideological, and the gency fees were not assessed to promote either the cause of nionism in general or political positions that a union leadership ight support but to which individual members might take gorous exception. *See Lehnert*, 111 S. Ct. at 1957-58. Apart om such constitutional concerns, the judgment of whether rrangements such as ALPA's will promote industrial peace or ad to disruptions in transportation and commerce must be left Congress. Because *Lehnert* makes clear that no constitutional arriers exist to the chargeability of the expenses in this case, I nare the court's conclusion that the judgment of the district ourt must be affirmed.

I am authorized to say that Judge Wilkins joins in this pinion.

USSELL, Circuit Judge, dissenting:

I feel impelled to dissent from the majority and concurring pinions. My reasons, stated in largely summary form, are as llows:

(1) In addressing, or failing to address, the charges assessed y the union against plaintiffs for litigation connected with the rikes at United Airlines and Continental Airlines, both the ajority and the concurring opinions disregard the rules of leading and of burden of proof enunciated by the Supreme

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eventh. I find this argument unconvincing. Plaintiffs have cited no authority support their argument that the standard governing under the RLA is fferent from that governing under the First Amendment, and both the *hnert* majority and dissent relied on statutory cases and recognized that there no bright line separating the constitutional and statutory analyses. *See hnert*, 111 S. Ct. at 1957 ("Although they are cases of statutory construction, *reet* and *Allen* are instructive in delineating the bounds of the First Amendent in this area as well."); *id.* at 1978 (Scalia, J., concurring in the judgment part and dissenting in part) ("*Street*, *Ellis*, and *Beck* were statutory cases, but ere is good reason to treat them as merely reflecting the constitutional rule ").

Court in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. Allen*, 373 U.S. 113 (1963). These litigation expenses were a substantial portion of the charges against plaintiffs; in fact, the union justified its need for additional assessments for the Major Contingency Fund on the ground that these expenses had been very large. The majority, however, completely avoids addressing these litigation charges by holding that plaintiffs failed to put in issue their validity because "nowhere in appellants' complaint, the stipulations of fact, or the district court's findings is there any mention of litigation expenses;" it even goes so far as to chide the parties for addressing the validity of these charges in their briefs. The concurrence fails entirely even to acknowledge that litigation expenses are part of this case.

Allen and *Abood* establish that to put in issue the validity of charges by the union against dissenting employees under an agency bargaining contract, dissenters are not required to identify the specific expenditures to which they object; it is only necessary that they allege generally that they oppose being charged for "expenditures of *any* sort" that are impermissible. *Abood*, 431 U.S. at 241; *Allen*, 373 U.S. at 118. Such an allegation puts in issue all the charges made by the union in the case and places on the union the burden of showing that such charges were proper. *Abood*, 431 U.S. at 239 n.40; *Allen*, 373 U.S. at 122; *see also Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 & n.16 (1986); *Beck v. Communications Workers*, 776 F.2d 1187, 1209 (4th Cir. 1985), *aff'd*, 487 U.S. 735 (1988).

Plaintiffs here stated in their complaint that they objected to any charges by the union that were impermissible under Section 2, Eleventh of the Railway Labor Act ("RLA"), § 2 (Eleventh), 45 U.S.C. § 152 (Eleventh). In addition, with regard to the charges for litigation in connection with the United and Continental strikes, they made more than a general objection because they expressly opposed in their complaint the union's charges for the expenses for United and Continental strikes, and the litigation expenses were part of expenses charged for the

strikes. Plaintiffs, therefore, clearly exceeded the requirements set forth in *Abood* and *Allen* to put in issue the validity of the union's charges for these litigation expenses.

It should be noted that counsel for the union and counsel for *amicus*, both of whom devoted substantial portions of their briefs to addressing the validity of these litigation charges, did not even attempt to argue that these charges were not at issue. That these two counsel, who are both experienced in labor litigation and have been involved with several of the Supreme Court decisions in this area of labor law, took this position illustrates well how far-fetched the majority's and concurrence's conclusion is that the litigation charges are not at issue here.

The majority's and concurrence's error in this respect is particularly critical. In *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 453 (1984), and *Lehnert v. Ferris Faculty Ass'n.*, 111 S. Ct. 1950, 1964 (1991), the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ("extra-unit litigation"), were not chargeable against the dissenter. For the great majority of plaintiffs here,[1] the litigation in connection with the United and Continental strikes was extra-unit litigation.[2] Thus, under *Ellis* and *Lehnert*, the expenses for this litigation were not chargeable against the great majority of plaintiffs. As a result, this issue alone is sufficient to require reversal of the decision of the district court herein.

(2) In their treatment, or lack of treatment, of the charges assessed by the union against non-union members for the threatened strike and strike at Eastern Airlines, the majority and

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[1] The exceptions are plaintiffs who are United pilots. No Continental pilots are plaintiffs.

[2] For an explanation of why the Air Line Pilots Association ("ALPA") is divided into separate units, see page 37 *infra*.

the concurring opinions ignore the Supreme Court's directive in *Lehnert* that in determining whether a union's charges are proper, each expenditure must be analyzed individually. At issue in this case are the union's expenditures for strikes at United and Continental and for a threatened strike and strike at Eastern. Both the majority and the concurrence analyze the chargeability of all of these expenditures together. The majority reiterates the district court's findings and interprets them to establish that "support for the striking pilots [in the industry] was of crucial importance in establishing the union's bargaining position in each airline unit." As a result, it holds that the expenditures for the United, Continental and Eastern controversies were "clearly justified." The concurrence similarly is "compel[led] . . . to conclude" that "the expenditures in support of the United and Continental strikes, and in preparation for a possible Eastern strike, are chargeable" based on the district court's findings that "collective negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines."

Lehnert, however, requires "a *case-by-case analysis* in determining which activities a union ... may charge to dissenting employees." *Id.* at 1959 (emphasis added). This required "case-by-case analysis" compels us to examine individually the chargeability of the union's expenditures for the threatened strike and strike at Eastern.

When the chargeability of the expenditures on the controversy at Eastern is examined individually, the majority's and concurrence's summary conclusions that these expenditures are chargeable cannot stand. The union had the burden of showing that charging plaintiffs for the expenditures was proper. *Abood*, 431 U.S. at 239 n.40; *Allen*, 373 U.S. at 122. The record, however, is completely barren of any explanation of the Eastern controversy or any reason why the controversy affected plaintiffs' collective bargaining. Indeed, while the circumstances of the Continental and United strikes were set forth by the union in the testimony of ALPA's president, the union failed to offer any evidence whatsoever about the Eastern controversy. No court

uld possibly find on this record that the union met its burden showing that the expenditures on the Eastern strike were oper.

In addition, the district court, on whose findings the ajority and concurrence base their summary conclusions that e union's expenditures on the United, Continental, and astern controversies are chargeable, made no finding that the astern controversy affected bargaining in the plaintiffs' units. fact, it made clear that it was not even aware that charges for e Eastern controversy were at issue in the case: "Plaintiffs' ... aim is that ... expenses for certain union activities, namely, the pport of the pilots' strikes at *United Airlines and Continental irlines*, ... were improper." (emphasis added).

Moreover, it is highly probable that, as a matter of constitu- onal and statutory law, charges for the expenditures on the astern controversy were impermissible. Plaintiffs stated at oral gument that the strike at Eastern was a sympathy strike in pport of a strike by a Machinists' Union unit. If plaintiffs' atement is true, the expenditures on the Eastern controversy ould have had no effect on the plaintiffs' collective bargaining nd clearly could not have been charged. *See Beck*, 776 F.2d at 212 (holding that charging non-union employees in a unit of a mmunications union for expenditures in support of a strike by e United Mine Workers was improper). Needless to say, I elieve that this issue alone is also sufficient to require reversal f the district court's holding that all the union's charges against laintiffs were proper.

(3) In setting forth their standard for determining the penses unions are permitted to charge against dissenting mployees, the majority and the concurring opinions grievously isconstrue the Supreme Court's opinion in *Lehnert* and give to a meaning that its author, Justice Blackmun, never contem- ated or intended. The majority and the concurring opinions tch onto a single, isolated sentence in *Lehnert*: "There must be me indication that the payment is for services that may timately enure to the benefit of the members of the local

union by virtue of their membership in the parent organization." *Lehnert*, 111 S. Ct. at 1961-62. They read this sentence as establishing a standard that any expenditures by the union for activities outside a dissenting employee's unit may be charged against the dissenting employee if the union shows that the activities "may ultimately enure" in this way.

As I will explain more fully below, this sentence in *Lehnert* was intended to set a chargeability standard only for a limited class of extra-unit expenses, not for all extra-unit expenses. *See* pages 34-36 *infra*. That it was not intended to be applied to all extra-unit expenses is clear for at least two reasons. First, the Court in *Lehnert* itself expressly declined to apply it as the chargeability standard for several of the extra-unit expenditures at issue before it. In addressing the chargeability of extra-unit litigation expenses, for example, the Court stated that "[w]hile respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, ... such activities are not germane to the union's duties as exclusive bargaining representative" and may not be charged against dissenting employees. *Id.* at 1963-64. In other words, even though expenses "may ultimately enure to the benefit of the members of the local union," they are not chargeable because they are not germane.

Second, the sentence latched onto by the majority and concurrence as the chargeability standard for all extra-unit expenses is fundamentally different from the standard for chargeability that the Court has employed in every opinion it has rendered relating to the issue before us and that *Lehnert* itself reaffirmed and adopted. The Court has held in every opinion relating to this issue that the standard for determining the validity of charges assessed against dissenters was that charges be "germane" to the collective bargaining of the dissenter's unit. *See, e.g., Communications Workers v. Beck*, 487 U.S. 735, 745 (1988) ("The statutory question presented in this case, then, is whether [a dissenter's obligation to support the union] includes the obligation to support union activities beyond those *germane* to collective bargaining, contract administration, and grievance

adjustment. We think *it does not*.") (emphasis added); *Ellis*, 466 U.S. at 448; *Abood*, 431 U.S. at 236; *Allen*, 373 U.S. at 121. Under the "germaneness" standard, expenses for litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit" were found chargeable, *Ellis*, 466 U.S. at 453; expenses for extra-unit litigation, *id.*, and extra-unit organizing, *id.* at 451-53, were held not chargeable.

Lehnert specifically adopted this same germaneness standard and, in doing so, expressly reaffirmed the holdings in all of these prior cases. *Lehnert*, 111 S. Ct. at 1959. Applying this standard, it determined that extra-unit litigation expenses, *id.* at 1963-64, and public-relations expenses "which covered informational picketing, media exposure, signs, posters and buttons," *id.* at 1964 (quotation omitted), were not chargeable, while expenses for a threatened strike in the dissenting employee's unit were chargeable, *id.* at 1965-66.

The great difference between the standard that the majority and the concurrence read *Lehnert* to establish and the germaneness standard is readily apparent when the former is applied to any of the expenditures the Court has analyzed under the germaneness standard. Extra-unit organization and extra-unit litigation, for example, would be chargeable under the majority's and concurrence's standard because there is "some indication that the payment [for them] is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.* at 1961-62. The Supreme Court has settled beyond doubt, however, that these expenditures fail to meet the germaneness test and may not be charged against dissenting employees.

In sum, *Lehnert* did not adopt a standard that extra-unit expenses are chargeable whenever there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.* at 1961-62. The majority and the concurrence err in adopting this language as a

general standard for the chargeability of extra-unit expenses and in holding that the expenditures for the strikes at United and Continental are chargeable on the ground they satisfy this mistaken standard.

(4) In indicating that *Lehnert*'s treatment of the chargeability of expenses used to prepare for a strike supports its own holding that the expenditures here for the controversies at Continental, United and Eastern were chargeable, the majority opinion misinterprets *Lehnert* again. *Lehnert* addressed the chargeability of certain "expenses incident to preparation for a strike" within the dissenters' bargaining unit. *Id.* at 1965. It explained that these expenses were chargeable because they "f[e]ll within the range of reasonable bargaining tools available to a public sector union during contract negotiations." *Id.* (quotation omitted). The majority cites this holding as supporting its holding that the expenditures for the strikes at United and Continental and the threatened strike and strike Eastern were chargeable.

It is clear from the *Lehnert* Court's analysis that its holding that these expenditures are chargeable rests upon the facts that (1) the threat of strike was in the unit of which the dissenters were members, and (2) the expenditures were made "during contract negotiations." So circumscribed, *Lehnert*'s holding does not apply to the expenditures here for the threatened strike at Eastern because, for the great majority of plaintiffs,[3] these were for a threatened strike *in another unit*. It also does not apply to the strikes expenditures at United, Continental and Eastern because these expenditures were also "extra-unit" expenditures for the great majority of plaintiffs[4] and, as they were used for

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[3] The exceptions are, obviously, plaintiffs who are Eastern pilots.

[4] Obviously, with regard to the expenditures on the Eastern strike, the exceptions are the plaintiffs who are Eastern pilots; with regard to the expenditures on the United strike, the exceptions are plaintiffs who are United pilots.

trikes and not threatened strikes, they were unrelated to contract negotiations." The majority, thus, errs in relying on *ehnert*'s holding regarding preparation for a strike to support is holding that the expenditures on the United, Continental and Eastern controversies are chargeable.

We now state in greater detail our reasons for disagreement vith the majority and the concurring opinions, beginning with a tatement of some of the facts that were not fully set forth in hese opinions.

I.

The Air Line Pilots Association (ALPA), which is the defendant in this action, is a national labor organization engaged n representing the pilots employed by twenty-two domestic irlines. The "governance structure" of ALPA, as described in he statement of Stipulated Facts, is that of "a unitary national abor organization not composed of local unions like other labor rganizations; all ALPA members belong only to one organiza-ion and paying their dues only to ALPA." Appendix ("App.") at 43. It operates as follows:

> Airlines station their pilots at domiciles (bases) and ALPA establishes a Local Council for each domicile of an airline. The pilots assigned to that domicile elect Local Council representatives for each pilot position—i.e., captain, first officer, second officer—stationed at that domicile. All of the local council representatives at each airline constitute the "Master Executive Council" (MEC) for that airline. Each MEC elects a Chairman, Vice-Chairman, and Secretary-Treasurer....
>
> All of the MEC's at all of the airlines constitute ALPA's Board of Directors, which is its highest governing body. The Board of Directors elects four national officers—President, First Vice President, Secretary, and Treasurer—and five Executive Vice

> Presidents. These officers are also *ex officio* members of the Board of Directors....

App. at 44.

The master executive council of each airline selects its own "negotiating committee" to conduct contract negotiations. App. at 45-46. It is true that these negotiating committees "report[] regularly to the President on the progress of such negotiations," "exchange information on what is happening at their respective airlines," and share "a staff of economic and financial analysts who collect data and perform studies relevant to collective bargaining." App. at 46. At bottom, however, each negotiating committee negotiates separately from the negotiating committees at other airlines and signs a separate collective bargaining agreement with each airline. App. at 45-46 ("The actual negotiations at each airline are conducted by a Negotiating Committee selected by the MEC at that airline...."). In many instances, these agreements contain different provisions. App. at 47-48.

The plaintiffs in the action are forty-two pilots employed by Braniff, Eastern, Midway, Northwest, Pan American, United, USAir, or Western. They do not belong to the union, and object to any charges against them by the union, under the heading "Dues," that went beyond expenses germane to the negotiation and administration of the collective bargaining agreement executed by their own employer.

The plaintiffs' objections focus on charges made against them by the union to support strikes at Continental, United, and a threatened strike and strike at Eastern in 1983-1987.[5] The

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[5] These charges were assessed against the plaintiffs in two ways. First, the union used part of the normal union dues, which the plaintiffs were required to pay, to support these strikes. App. at 86. Second, in June, 1985, to better its ability to support strikes, the union increased its dues in order to create a "Major Contingency Fund." App. at 48. Plaintiffs were required to pay these

record is not entirely clear as to exactly how these charges were used to support these strikes and this threatened strike throughout this period. It is clear, however, that a portion of the charges assessed against the plaintiffs in 1985, 1986, and 1987 to support the Continental strike was used to fund litigation related to that strike. App. at 86, 99, 110A, 121, 126, 128. In addition, at least in 1986, some of the charges assessed against the plaintiffs to support the United strike were used to finance litigation related to that strike. App. at 98. The proportion of strike expenditures used to fund litigation was apparently substantial because the union justified its additional assessments for the Major Contingency Fund on the ground that it had incurred heavy litigation expenses in connection with the Continental and United strikes.

The record is also hopelessly unclear on the cause of the threatened strike and strike at Eastern. The only witness to testify about the causes of the several strikes the plaintiffs were charged to support was ALPA's president, Captain Henry Duffy. Counsel for the union examined Captain Duffy in detail about the cause of the Continental strike, Trial Transcript ("Tr.") at 68-70, and the cause of the United strike, Tr. at 70-72; he did not ask him a single question about the threatened strike at Eastern. At argument, plaintiffs' counsel stated that the threatened strike was in sympathy with a strike by the members of a local union of the Machinists' Union at Eastern.

The district court found all of the union's charges lawful and dismissed plaintiffs' claims. Quoting *Ellis*, 466 U.S. at 448, it stated that the union could properly charge plaintiffs for expenses incurred for "activities or undertakings *normally or reasonably employed to implement or execute the duties of the union as exclusive bargaining representative.*" (emphasis added). The expenditures on strikes at United and Continental, it

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increased dues to create and develop this fund, which was used from 1985-1987 almost exclusively to support the United, Continental, and Eastern strikes. App. at 128.

determined, "were reasonably employed to implement the duties of the union as exclusive representative of the employees in [other] bargaining unit[s]" because, since "collective bargaining negotiations at any one airline are directly affected by, and directly affect, negotiations at all other airlines," expenses to support strikes at United and Continental were "directly beneficial to the bargaining unit of each plaintiff." It did not acknowledge that a significant portion of these expenditures were incurred for litigation in connection with the strikes.

The district court did not address whether the expenditures on the threatened strike at Eastern were reasonably employed to implement the union's duties as bargaining agent. In fact, while the record clearly shows that plaintiffs were charged for these expenses and that plaintiffs specifically objected to them in their complaint, the district court never recognized that such expenses were at issue in the case. As it understood the case, "[p]laintiffs' ... claim [was] that ... expenses for certain union activities, namely, the support of the pilots' strikes *at United Airlines and Continental Airlines*, ... were improper." (emphasis added); in fact, nowhere in its opinion is there a single reference to the Eastern controversy. However, by sustaining all of the union's charges against plaintiffs, the district court held, unknowingly, that expenses incurred for the threatened strike and strike at Eastern were chargeable against plaintiffs.

The majority affirms the district court's holding that all of the union's charges were proper. It states that under *Lehnert*, which was decided after the district court issued its opinion, the union may charge dissenters for the expenditures on the controversies at United, Continental, and Eastern if there is "some indication that the payment [for them] [was] for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 111 S. Ct. at 1961-62. It holds that these charges "handily meet the *Lehnert* test" because "negotiations at other airlines ... determined the result of the bargaining process [at each airline bargaining unit]." The majority declines to address the charges for litigation expenses incurred in

connection with the United and Continental strikes on the ground that the issue of their validity "was not properly presented or preserved below."

The concurrence, too, would affirm the district court's holding that all the union's expenses here are chargeable. It finds *Lehnert* to establish as the chargeability standard here the same standard used by the majority, and concludes that the expenses on the United, Continental, and Eastern controversies satisfy this standard because "collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines." It fails even to mention that a substantial portion of the strike expenses at United and Continental were incurred for litigation.

II.

The issue in this appeal is a recurring one which involves the construction of important provisions of both the RLA and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and which has unquestionable constitutional implications. It is whether a union, designated as exclusive bargaining agent for an employer's employees under an agency contract,[6] may impose on non-union employees in the bargaining unit "dues" to be used in whole or in part for activities objected to by the non-union employees in the bargaining unit. The problem emerged in the enactment of Section 2, Eleventh, in the 1951 revision of the RLA, which authorized the execution of agency contracts. Under the agency contract concept, the union, when selected as bargaining agent, functions as the exclusive bargaining agent for all employees, union or non-union, with the power to exact from all of them "dues."

In *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956), the Supreme Court addressed the constitutionality of these

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[6] For an explanation of the difference between a strict union-shop agreement and an agency shop, see *Abood*, 431 U.S. at 217.

agency contract arrangements. The Court recognized that exacting dues from non-union employees implicated their constitutional rights. *Id.* at 235. The Court held, however, that, since the union as bargaining agent was obligated to represent the non-union employee along with the union employee, the union was entitled to charge the non-union employee for the costs of the "work of the union in the realm of collective bargaining" which it was statutorily required to conduct. *Id.*

Five years later, in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court made clear that unions' power to charge dissenting employees was limited. In *Street*, the plaintiffs, non-union employees, challenged as impermissible certain charges made by the union to further its political purposes. The Court found that such expenditures, which were incurred for the purpose of "support[ing] candidates for public office, and advanc[ing] political programs, [are] not [for] a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Id.* at 768. As a result, it held the challenged expenses not chargeable. *Id.* at 768-69. As had *Hanson*, *Street* eschewed going beyond the actual challenged expenditures before it, stating that "[w]e are not called upon to delineate the precise limits of th[e] power [to charge dues] in this case." *Id.* at 768.

Between *Street* and *Ellis*, which was decided in 1984, the Supreme Court laid down in *Allen* and *Abood* the rules of pleading and burden of proof to be followed in alleging a proper cause of action contesting the propriety of charging an impermissible expenditure in the agency collective bargaining context. Plaintiffs in *Allen* alleged that some of the dues exacted from them under the agency contract "have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs." *Allen*, 373 U.S. at 118. The Court held that "[t]his allegation sufficiently states a cause of action," because "[i]t would be impracticable to require a dissenting employee to allege and prove each

istinct union political expenditure to which he objects; it is nough that he manifests his opposition to *any* political expendi-ures by the union." *Id.* (emphasis in original). The Court easoned that "[s]ince the unions possess the facts and records rom which the proportion of political to total union expendi-ures can reasonably be calculated, basic considerations of airness compel that they, not the individual employees, bear the urden of proving such proportion." *Id.* at 122. This ruling in *llen* was reaffirmed in *Abood*:

> But in holding that as a prerequisite to any relief each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen*. As in *Allen*, the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure. It would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative.

Abood, 431 U.S. at 241 (footnote omitted).[7]

Ellis, decided almost twenty years after *Abood*, was a critical tep in the development of the case law in this area because it vas the first decision to give real substance to the chargeability analysis that the Court initiated in *Hanson* and *Street*. The Court in *Ellis* indicated that its prior opinions on chargeability

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[7] The Supreme Court in *Abood* also held that there was no real difference etween collective bargaining in the public and private sectors for constitutional urposes. *Abood*, 431 U.S. at 230.

had established the polar extremes in the chargeability analysis: expenses relating directly to a dissenting employee's collective bargaining agreement could be charged against him, while expenses for the union's political or ideological activities could not. *Id.* at 447. At the same time, the Court recognized that its prior cases had not required it to address the chargeability of the plethora of union expenses falling between these two extremes; it had gone no further than to state simply that such expenses were chargeable if they were "germane" to collective bargaining. *Id.*

Before proceeding to evaluate the chargeability of several such expenses under Section 2, Eleventh of the RLA, the Court elected to define more explicitly its "germaneness" standard:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448.

The first expense to which the Court applied this test was for "conventions." The conventions for which dissenters were charged were "national convention[s] at which the members elect[ed] officers, establish[ed] bargaining goals and priorities, and formulate[d] overall union policy." *Id.* The Court found that these conventions allowed the union to "maintain its corporate and associational existence, ... elect officers to manage and carry on its affairs, and ... consult its members about overall

bargaining goals and policy." *Id.* Such things related to collective bargaining in each local unit because they "guide[d] the union's approach to collective bargaining" and increased "its effectiveness in negotiating labor agreements." *Id.* at 449 (quotations omitted). The Court concluded that this relationship to "the union's discharge of its duties as bargaining agent," *id.*, was sufficiently close to allow the union to charge their expenses against dissenters. *Id.* at 448.

The Court next analyzed the chargeability of expenses of the national union for social activities. These social activities expenses had "go[ne] toward purchasing refreshments for union business meetings and occasional social activities." *Id.* at 449. The Court found that "[l]ike conventions, social activities [were] a standard feature of union operations." *Id.* at 450. "While these affairs [were] not central to collective bargaining," *id.* at 449, the Court determined that they did relate to it "because they br[ought] about harmonious working relationships, promote[d] closer ties among employees, and create[d] a more pleasant environment for union meetings," *id.* at 449-50. It held that this was a sufficiently close relationship to collective bargaining to allow unions to charge these "*de minimis*" expenses, *id.* at 450, to dissenting employees, *id.* at 449.

The Court then turned to expenses for "publications." The national union "put[] out a monthly magazine" for all the employees in each of its local unions,[8] and charged dissenting employees for the portion of its costs that were attributed to articles "concerning collective bargaining, contract administration, and employees' rights." *Id.* at 450 (quotations omitted).

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[8] In the union involved in *Ellis*, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, the national union is referred to as the "Grand Lodge" and the local unions are referred to as "Local Lodges." *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 685 F.2d 1065, 1068 (9th Cir. 1982), *rev'd*, 466 U.S. 435 (1984). The publication expenses, as well as the social expenses that are addressed *infra*, were expenses of the Grand Lodge.

The Court found that publication of such articles related to the collective bargaining of each dissenter's unit because the articles were "the union's primary means of communicating information concerning [such matters]," which were related to collective bargaining. *Id.* (quotations omitted). The Court decided that such a relationship to collective bargaining was sufficient to allow these expenses to be charged against dissenters. *Id.* at 451. It made clear, however, that publications expenditures for articles not relating to collective bargaining, contract administration, or employees' rights were not chargeable. *Id.*

The Court also considered the chargeability of expenses incurred by the union for "organizing" and "litigation" outside the dissenting employee's collective bargaining unit, and found them to be of a different character than expenses for conventions, social activities, or publications. It acknowledged that expenses on organizing in another unit bore at least an "attenuated connection" to collective bargaining in the dissenter's unit because the "organizing efforts [were] aimed toward a stronger [national] union, which in turn would be more successful at the bargaining table." *Id.* at 451. The Court found, however, that this relationship to collective bargaining in the dissenter's unit was not sufficiently close to sustain the chargeability of expenses for extra-unit organizing under section 2, Eleventh for two reasons. *Id.* First, the benefit to collective bargaining gained by extra-unit organizing is secured only through "the overall expansion of union power" and expanding union power was not the purpose of section 2, Eleventh, which limits chargeable activities to those matters germane to the union's duties as exclusive bargaining representative. *Id.* at 451-52. Second, while "it may be that employees will ultimately ride for free on the union's organizing efforts outside the bargaining unit," *id.* at 452, free riding on these benefits is not the type of free riding that Section 2, Eleventh seeks to prevent, *id.* at 452-53.

The court addressed the chargeability of litigation expenses similarly and its conclusion was equally clear: "The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes" and of certain other types

of litigation were chargeable to dissenters *only* if the litigation arose within the dissenters' unit. *Id.* at 453. "The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees." *Id.*

Having determined that the RLA permitted the union to charge dissenters for these conventions, social activities and publications, the Court addressed whether these charges violated the First Amendment and determined that they did not. It stated that forcing dissenters to contribute to union social hours does not "trigger First Amendment protection" because

> the communicative content [of being forced to contribute to these activities] is not inherent in the act [of contributing], but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union [that is inherent in allowing the union shop].

Id. at 456 (emphasis in original). The Court concluded that charges for the *union* conventions and publications distributed only to *union* members were constitutionally permissible for the same reason. *Id.* While both of these activities "have direct communicative content and involve the expression of ideas," the Court "perceived little additional infringement of First Amendment rights beyond that already accepted" because this "communicative content" and "expression of ideas" was not in any way directed outside of the union. *Id.*

The Court's most recent decision relating to the issues here was *Lehnert*.[9] In *Lehnert*, the employer was a public education-

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[9] After *Ellis* and prior to *Lehnert*, the Court decided *Beck*, a case which arose in our Circuit. *Beck* addressed the chargeability of certain expenses under section 8(a)(3) of the NLRA, which is interpreted identically with Section 2,

al institution established under Michigan law. An affiliate of the Michigan Educational Association and the National Educational Association, the defendant Ferris Faculty Association ("FFA"), was the exclusive bargaining agent of the members of the faculty of FFA. The plaintiffs were members of the faculty of FFA and, as such, were subject to the payment of dues as set by the union for members of the Association. These faculty members objected to being charged by the union for the costs of (1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike by the FFA which, had it materialized, would have violated Michigan law. The lower court had held that all the challenged charges were "sufficiently related to the union's duties as the exclusive bargaining representative ... to justify compelling petitioners to assist in subsidizing [them]." *Id.* at 1956.

The Supreme Court, after reviewing the earlier relevant Supreme Court decisions, declared that in determining which expenditures may be charged by the bargaining representative against dissenting employees in the bargaining unit, the Court should engage in a "case-by-case analysis" of each charge. *Id.* at 1959. In applying this analysis, the Court stated that to be chargeable against dissenting employees the costs "must (1) be

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Eleventh. It is relevant to the case at bar for two reasons. First, the Court there strongly reaffirmed the "germaneness" test that the majority and concurring opinions would destroy. The Court stated: "The statutory question presented in this case, then, is whether [a dissenter's obligation to support the union] includes the obligation to support union activities beyond those *germane* to collective bargaining, contract administration, and grievance adjustment. We think *it does not*." *Beck*, 487 U.S. at 745. Second, we had held that expenditures by a communications union to support a strike by the United Mine Workers were not chargeable to dissenting employees in the communications union. The union sought, and was granted, certiorari, but did not request review of our decision on this point; our decision that the payments to the United Mine Workers were not chargeable is, thus, the law in this Circuit.

germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.*

In following those instructions, the Court first held that even in the case of public employees whose salaries are fixed to some extent politically, where "lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Id.* at 1959-60. It invalidated such "assessments for political activities outside the scope of the collective-bargaining context" in part because they "would present 'additional interference with the First Amendment interests of objecting employees.'" *Id.* at 1960 (quoting *Ellis*, 466 U.S. at 456).

Somewhat similar to the charge for "lobbying" was one covering (1) the costs of a program to secure funds supporting public education in Michigan, a program which could be expected to increase financial assistance to the academic program at Ferris State College, and (2) that portion of a MEA publication reporting the progress of the program. Although, arguably, these costs might "ultimately benefit" to some extent the members of FFA, the Court responded firmly to the claim of chargeability for such activities that "none [of these charges] may be supported through the funds of objecting employees" because "[n]one of these activities was shown to be oriented toward the ratification or implementation of petitioner's collective-bargaining agreement." *Id.* at 1963. It should be noted that the language of Justice Blackmun in this instance, as well as his conclusion in the previous instance of "lobbying," was not an expression of a perfunctory opinion. Justice Marshall dissented specifically because of the majority opinion's reason for disallowing this charge (*i.e.*, that it was not "oriented toward

the ratification or implementation of a petitioner's collective bargaining agreement").

The cost of litigation, which the union sought to charge against dissenters, provides an important ruling that relates directly to the case at bar. "Litigation costs" were discussed in connection with the claimed "allowance of several activities that the union did not undertake directly on behalf of persons within petitioners' bargaining unit." *Id.* at 1963. Some of these activities embraced "general collective-bargaining costs of the state or national parent union." *Id.* These the Court approved. The Court found that "[t]his rationale d[id] not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities." *Id.* The Court added:

> While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extra-unit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation. See, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963) (recognizing that for certain groups, "association for litigation may be the most effective form of political association"). Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. See *Ellis*, 466 U.S. at 453, 104 S. Ct., at 1894. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extra-unit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector.

Id. at 1963-64.

"Strike benefits" was a large item in the charges made against the dissenters by the union bargaining agent. This issue arose in this case at a time when the FFA was "engaged in negotiating a new collective-bargaining agreement." *Id.* at 1965. The negotiation proceedings appeared to be making little progress, and for that reason the union was proceeding "to go out on strike" as a means of promoting progress in the negotiations. *Id.* The Court of Appeals had asserted that the rationale for charging the costs of these preparations ratably against the dissenting employees was that "such expenditures fall within the range of reasonable bargaining tools available to a public sector union during contract negotiations." *Id.* The Court accepted this rationale, declaring that, "[i]n sum, these expenses are substantively indistinguishable from those appurtenant to collective-bargaining negotiations." *Id.* It is manifest that this ruling was in the context of a period of actual contract negotiations involving the very unit of which the dissenting employees-plaintiffs were members.

Finally, the Court of Appeals had approved certain "[p]ublic relations expenditures designed to enhance the reputation of the teaching profession." *Id.* at 1964. The Court, however, disagreed, stating:

> [P]ublic speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

Id. The Court went on to dismiss the reasoning of the Court of Appeals, which would liken these changes to certain of the "*de minimis*" charges approved in *Ellis*. It rejected the analogy, saying that any such rule would not extend to the public relations charges asserted by the union in *Lehnert*, which

"covered informational picketing, media exposure, signs, posters and buttons." *Id.*

Ellis and *Lehnert* make clear that chargeability analysis under both the RLA and the Constitution is driven by whether compelling contributions for the activity at issue implicates dissenters' First Amendment rights. Whether First Amendment rights are implicated is driven, in turn, by whether the activity has "communicative content" outside of the union. *Ellis* recognized that union conventions, publications distributed only to union members, and union social activities had no communicative content outside the union, *Ellis*, 466 U.S. at 456, and it allowed the union to charge dissenters for these activities merely by showing that they related to collective bargaining in the dissenters' unit in such small ways as "bringing about harmonious working relationships," *id.* at 449, and "maintain[ing] [the union's] corporate or associational existence," *id.* at 448. On the other hand, extra-unit organizing and litigation, which clearly had communicative content outside of the union, could not be charged against dissenting employees even though the Court acknowledged that they had at least an "attenuated connection" to the dissenters' collective bargaining. *Id.* at 451.

Lehnert explicitly recognized that expenses for activities that have no communicative content outside of the union, which it termed "non-ideological expenses," are to be given different treatment in the chargeability analysis:

> While we consistently have looked to whether *non-ideological* expenses are "germane to collective bargaining," ... we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.
>
> ....
>
> The Court recognized as much in *Ellis*. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent union's national conventions. It reasoned that "if a

union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." ... We see no reason why analogous public sector union activities should be treated differently.

We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of costs associated with the otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit.... There must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization.

Lehnert, 111 S. Ct. at 1961-62 (emphasis added) (citations and footnotes omitted). In other words, "non-ideological" expenses may be charged against dissenting employees on the mere showing that they "may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.*

The Court approved on this basis the union's charges for "informational support services" that informed union members about "teaching and education generally, professional development, unemployment, job opportunities, award programs of the NEA, and other miscellaneous matters" because these services were "neither political nor public in nature" and were "comparable" to the social activities in *Ellis*. *Id.* at 1964. The Court also approved the union's charges for its national conventions under this lenient rule. *Id.* at 1964-65.

The expenses addressed by the Court that had communicative content outside of the union were not analyzed under this rule and were accorded stricter treatment. Extra-unit litigation, which the Court found "political and expressive," could not be charged against dissenters despite the fact that "precedent established through litigation on behalf of one unit may ultimately be of some use to another unit." *Id.* at 1963. Similarly, the Court found that public-relations activities involving "informational picketing, media exposure, signs, posters and buttons" had "communicative content" that did not "derive solely from the union's involvement in them" and held such activities not chargeable even though they were clearly of some benefit to dissenters' collective bargaining. *Id.* at 1964. The only activity with communicative content directed outside the union that the Court found could be charged against dissenters was preparation for a strike in the dissenters' unit because it was "within the range of reasonable bargaining tools available to a ... union during contract negotiations." *Id.* at 1965.

III.

I have reviewed the facts and the applicable law in this case, and turn now to applying that law to the expenditures at issue here. These expenditures are best divided into three groups: expenditures for the Continental and United strikes that were incurred on litigation, expenditures for the strike and threatened strike at Eastern, and expenditures for the Continental and United strikes that were not incurred on litigation. I will address each group in turn.

A.

I begin by addressing the union's charges for the litigation in connection with the United and Continental strikes for two reasons. First, counsel for ALPA and counsel for *amicus*, both of whom, as I mentioned earlier, are very experienced in labor litigation, gave special prominence and consideration in their briefs to the issue of whether these charges were proper. Second, the justification offered by ALPA to its members and

non-members in demanding additional assessments for its Major Contingency Fund was that it had incurred heavy litigation expenses in connection with the Continental and United strikes. This makes evident that these litigation expenditures were substantial and relevant, which is reaffirmed by the abundance of references to them in the Appendix herein. *See* App. at 86, 98, 99, 110A, 121, 126, 128.

Both *Ellis* and *Lehnert* establish, in as clear terms as are possible, an unqualified rule that charges for extra-unit litigation expenses are improper. *Ellis*, 466 U.S. at 453; *Lehnert*, 111 S. Ct. at 1963-64. ALPA is divided into separate units by airline. The union at each airline elects its own negotiating representatives and negotiates its collective bargaining agreement with its airline employer separately from the union at other airlines. The record shows that in a number of instances the agreements reached by the union at different airlines have had different provisions. . a result, regardless of the fact that these negotiating representatives have certain interactions with each other and with ALPA, ALPA's organization is not materially different from the organization of the unions in *Ellis* or *Lehnert*, which the court found to be composed of separate units. Charges were assessed against plaintiffs, most of whom are pilots from units other than United and Continental, for expenditures on litigation in connection with strikes at United and Continental.[10] Such charges are clearly both statutorily and constitutionally improper under *Ellis* and *Lehnert*. I would, therefore, reverse the district court's holding with respect to these charges.

Neither the district court, nor the majority, nor the concurrence address these litigation expenses. The district court and the concurrence do not even acknowledge that they were

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[10] Obviously, litigation expenses incurred in connection with the United strike were not extra-unit expenses with respect to plaintiffs who were United pilots. However, as no Continental pilots are plaintiffs in this case, these expenses are extra-unit expenses for all plaintiffs except those that are United pilots.

charged against the plaintiffs and the majority concludes that the plaintiffs did not put their validity in issue. Given the rules of pleading in *Allen* and *Abood* and the Court's clear rule that extra-unit litigation is not chargeable, it is incredible that the district court allowed these substantial extra-unit litigation charges without comment. Even more incredible is the action of the majority and concurrence who, despite having the benefit of both *Ellis* and *Lehnert*, affirm the district court's holding allowing these charges.

The union seeks to persuade us to find these extra-unit litigation expenses chargeable by suggesting that Justice Blackmun's opinion in *Lehnert* is not the majority opinion on the issue of extra-unit litigation. It reasons that only Justices Rehnquist, White, and Stevens join Justice Blackmun on this issue, and that the concurring and dissenting opinions written by Justices Scalia, Marshall and Kennedy for the rest of the Court indicate that they would allow charges for extra-unit litigation. While the union's suggestion is creative, it is not persuasive as Justice Scalia began his opinion by stating that he "would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." *Lehnert*, 111 S. Ct. at 1975 (Scalia, J. dissenting). Quite clearly, supporting litigation in other units is not a "duty" that the RLA required the union here to perform.

B.

I addressed in detail in my introductory statements the chargeability of the union's expenditures for the threatened strike and strike at Eastern. Analyzing these expenditures independently from the expenditures for the strikes at United and Continental, as *Lehnert* requires us to do, *id.* at 1959, no court could conclude that the union has met its burden, under *Allen* and *Abood*, of showing that these expenses are chargeable because there is literally nothing in the record either explaining the Eastern controversy or showing why the controversy affected the union's collective bargaining duties. Moreover, it is highly probable the union could not, as a matter of law, make the

required showing because plaintiffs stated at oral argument that the Eastern strike was a sympathy strike and charging dissenters for expenditures to support a sympathy strike would be statutorily and constitutionally impermissible. *See Beck*, 776 F.2d at 1212. Thus, I would also reverse the district court's holding with respect to the charges for the strike and threatened strike at Eastern.

C.

The expenditures for the Continental and United strikes that were not incurred for litigation connected with these strikes must be addressed under the chargeability analysis of *Ellis* and *Lehnert*. *Ellis* and *Lehnert* allow unions to charge dissenters for "nonideological expenses" if the activities on which these activities are incurred "may ultimately enure to the benefit of the members of the local union." *Lehnert*, 111 S. Ct. at 1961-62. However, expenses for activities that have "communicative content" directed outside of the union are more difficult to charge. In addressing such expenses, the Court has found that expenses for extra-unit litigation, *Ellis*, 466 U.S. at 453; *Lehnert*, 111 S. Ct. at 1963-64, for extra-unit organizing of non-members, *Ellis*, 466 U.S. at 451-53, and for public-relations activities involving "informational picketing [and] media exposure," *Lehnert*, 111 S. Ct. at 1964, are not sufficiently related to collective bargaining in the dissenter's unit to be chargeable, while expenses for a threatened strike in the dissenter's unit during contract negotiations are sufficiently related, *id.* at 1965.

The union's expenditures for strikes at United and Continental are not the type of "nonideological expenses" the Court contemplated in *Lehnert* because the strikes clearly have "communicative content" that is directed outside the union. The strikes are, thus, unlike the union conventions, union social activities, union informational support services for union members, or union publications distributed to union members; instead, they are similar to union litigation, organization, and union public-relations activities involving picketing and media exposure. Therefore, their chargeability is not properly analyzed

under the standard of whether they "may ultimately enure to the benefit of the members of the local union," but under the Court's more difficult chargeability standard.

Under this standard, the expenses for the strikes at United and Continental are not chargeable. For the majority of plaintiffs, these are extra-unit strike expenses. *See* note 10 *supra*. In *Lehnert* and *Ellis*, the Court addressed several expenses for extra-unit activities that had communicative content outside of the union, including expenses for extra-unit litigation, extra-unit organizing, and public-relations activities by the national union involving picketing and media exposure. It found every one of these expenses to be not chargeable against the dissenting employees. I can see no reason why the expenses here for extra-unit strikes should be distinguished from all of the other expenses the Court has addressed for extra-unit activities with communicative content outside the union, and particularly no reason why they should be distinguished from extra-unit litigation.[11]

Moreover, *Lehnert* specifically held that a union could not charge for activities that had the kind of relationship to bargaining in the dissenters' units that these strikes had. These strikes are related to bargaining in the dissenters' units because each contract in the industry serves as precedent for future contracts and, thus, a strike in one unit directly affects collective bargaining in the other units in the industry. *Lehnert*, however, held that extra-unit litigation, which has this same kind of relationship to collective bargaining in the dissenters' units, was not chargeable. It stated that "[w]hile respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to some other unit," extra-unit litigation is not chargeable because it is "not germane to the

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[11] As I indicated in my introductory statements, *Lehnert*'s discussion of strike preparation expenses is not applicable to the strike expenses here because it was confined to addressing only strike preparation within the dissenters' unit.

union's duties as exclusive bargaining representative." *Id.* at 1963-64.

In sum, I would reverse the district court's holding that the expenses for the strikes at United and Continental were chargeable.[12]

The majority and the concurrence only avoid this result by taking a single, isolated sentence in *Lehnert* and adopting it as a standard for determining the chargeability of all extra-unit expenses. As I indicated in my discussion of the law, this sentence—"There must be some indication that the payment is for services that may ultimately enure to the benefit of the members for the local union by virtue of their membership in the parent organization"—only applies to the chargeability of expenses for "nonideological" activities that have no communicative content directed outside the union. Ironically, the Court intended the sentence to limit the chargeability of expenses for activities with no communicative content outside of the union, not, as the majority and concurrence interpret it, to expand immensely the chargeability of all extra-unit expenses. As I indicated in my introductory statements, the majority's and the concurrence's interpretation of the sentence as establishing a standard for the chargeability of all extra-unit expenses is belied by the facts that (1) *Lehnert* itself did not apply the sentence as a standard for all the extra-unit expenses before it and (2) this standard would fundamentally alter the chargeability standard of "germaneness" that the Court has used in all of its cases relating to this issue and that *Lehnert* itself explicitly adopted.[13]

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[12] I stated in Part B *supra* that I would hold the expenses on the Eastern strike and threatened strike not chargeable because the union did not meet its burden of showing otherwise. I explain here that, under *Ellis* and *Lehnert*, no expenses for extra-unit strikes are chargeable. This is a second reason why the expenses on the Eastern strike are not chargeable.

[13] The concurring opinion indicates that it would only apply this standard to "nonideological" extra-unit expenses. It does not elaborate, however, on the meaning of "nonideological" and summarily holds that the strike expenses here

IV.

In conclusion, I would hold that none of the union's expenditures at issue in this case may be charged against the plaintiffs and would, thus, reverse the district court's decision on all of these charges.

Judge Widener, Judge Niemeyer, Judge Hamilton, and Judge Luttig join in this dissent.

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are "nonideological" expenses. The concurring opinion is correct that this standard applies only to "nonideological" expenses. However, it fails to note that "nonideological" expenses are expenses for activities that have no communicative contact directed outside of the union; they are not some broader, amorphous category into which these strike expenses may be placed.

APPENDIX B

DECISION OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

March 17, 1989

BEST AVAILABLE COPY

Peter CRAWFORD; Frederick J. Adam; Robert F. Brauman; Richard L. Brown; William A. Burbage; Robert Erchak; Ron E. Merzlak; Leroy Rogers; Roger F. Seely; Warren Wells; Dale Cross; Richard Pederson; Clyde B. Smith; Ernest Mueller; Ruel Neeley; Robert Buley; Thomas Giefer; Klemens Thomas; Howard L. Jones; Herbert A. Light; Joseph R. Mackensie; Michael T. McQuillen; John R. Yotz; Harold Bagnall; Richard P. Barthelemy; Clinton Davis; Edison L. Denney; George Gawrilow; John J. Lumley; Albert Newton; Eugene Palsson; Dale B. Petty; Deryl Roark; Donald D. Ecker; Karl A. Jadrnicek; Howard S. Morton; Richard W. Rew; Donovan Wholers; Donald K. Brewster; Peter Hayes; Laurence J. Stuppy, III; Roger Veon; Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, Defendant-Appellee,

Transportation Communications International Union, Amicus Curiae.

No. 88-2083.

United States Court of Appeals,
Fourth Circuit.

Argued Dec. 5, 1988.

Decided March 17, 1989.

Rehearing In Banc Granted May 11, 1989.

* * * *

Before ERVIN, Chief Judge, BUTZNER, Senior Circuit Judge, and MALCOLM J. HOWARD, United States District

Judge for the Eastern District of North Carolina, sitting by designation.

BUTZNER, Senior Circuit Judge:

Forty-two nonunion commercial airline pilots appeal a judgment of the district court, entered after a bench trial, in favor of the Air Line Pilots Association, which is a union representing pilots employed by various airlines. The district court held that the Association need not rebate the portion of the pilots' agency fees the Association spent to support strikes at airlines that did not employ the objecting pilots or the portion of the fees that the Association allocated to a contingency fund for support of future strikes. The district court also held that the Association's current procedure for making rebates to the pilots, adopted after the decision of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), satisfied the requirements explained in that case and that the procedure used before *Hudson* was decided substantially complied with the requirements. We affirm on both issues.

I

Section 2 Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, which is applicable to airlines, permits employers and unions to execute bargaining agreements requiring employees to become union members. The Supreme Court sustained the constitutionality of section 2 Eleventh under the commerce clause. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). Nevertheless, the Court has consistently held that a union cannot exact funds from a nonmember to spend for purposes that would infringe nonmembers' constitutional rights. In *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court construed the statute to allow employees to elect not to join the union, or to resign, and to pay agency fees to the union in lieu of dues. In *Street* and subsequent cases, the Court drew a line between two categories of expenditures, those germane to collective bargaining and those which would infringe

a nonmember's rights. It recognized that Congress enacted the statute to eliminate "free-riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the cost thereof." *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984). In *Ellis*, the Court explained what portion of the nonmembers' agency fees a union could retain and what portion it must rebate. The Court prescribed the following test:

> ... [W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employers on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

466 U.S. at 448, 104 S.Ct. at 1892.

The pilots challenge several specific expenditures that the Association classified as germane to collective bargaining and therefore not reimbursable to agency fee-payers. They maintain that expenditures in 1985, 1986, and 1987, in support of strikes at United Airlines and Continental Airlines, and in preparation for a possible strike at Eastern Airlines, should not be charged to agency fee-payers who are not United, Continental, or Eastern employees. They also object to use of their agency fees for the creation and maintenance of a strike reserve fund called the war chest or major contingency fund. The pilots assert that use of agency fees for bargaining expenses outside of the immediate bargaining unit, or airline, for which the fee-payer

works, violates both the Railway Labor Act and their constitutionally protected free association rights.

If an expenditure is germane to a union's obligation as the employees' representative, the union may charge a proportionate share of that expenditure to agency fee-payers, without offending either the Railway Labor Act or the first amendment. *See Ellis*, 466 U.S. at 444-47, 104 S.Ct. at 1890-92. As stipulated by the parties, and found as a fact by the district court, the Association is a "unitary national labor organization." It has no locals, and all dues and fees are paid directly to the national union, which negotiates contracts with the various airlines for the pilots of whom it is the exclusive bargaining representative. Bargaining policies are established by its national officers, and all negotiations and agreements must be approved by them. This kind of industry-wide bargaining is neither unique to the airline industry nor novel to the courts. *See Childers v. Brotherhood of R.R. Trainmen*, 192 F.2d 956, 959 (8th Cir.1951) ("the national organization, not the local lodges, is the collective bargaining representative within the meaning of the Railway Labor Act"). The Railway Labor Act "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346, 64 S.Ct. 582, 585, 88 L.Ed. 788 (1944).

The district court's findings of fact, which we quote at some length, are essential to an understanding of why the Association's expenditures are germane to collective bargaining with all airlines whose pilots it represents. With respect to the nature of collective bargaining in the airline industry, the court found:

> [C]ollective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some cost-cutting concession from [the Association], other airlines generally seek to obtain the

> same or an equivalent concession. On the other hand, when [the Association] succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.

With respect to the expenditure of funds to support the striking Continental employees, the court found:

> Consequently, it was important to [the Association], in the interest of all the pilots which it represented, to ensure that what had happened at Continental, namely, a bankruptcy whereby the collective bargaining agreement was abrogated and pilots' salaries were cut in half, not become an industry norm to be sought by other airlines in the bargaining process. For this reason it was in the interest of all pilots, members and non-members alike, that [the Association] used its funds to pay the pilots at Continental to make up for their lost wages.

The court also found justification for the Association's refusal to rebate agency fees used along with other union funds to support the strike at United Airlines. It found:

> [I]n 1985, United sought in bargaining to impose a concession which American Airlines had achieved [with another union], namely, a B-Scale two-tier payment arrangement under which airline cockpit personnel hired after a certain date would be paid on a lower pay scale (the B-Scale). [The Association] supported financially the pilots who struck United, and ultimately, after a twenty-nine day strike, secured from United a six year parity requirement under the B-Scale arrangement. This accomplishment has been used to benefit all members (and non-members) in all the airlines, not just those employed by United.

With respect to expenditures for the strike reserve or contingency fund, the court found:

> The United and Continental strikes considerably weakened [the Association]'s financial stability. Since a financially weak [Association] was vulnerable to a prolonged strike, [the Association] lost its credibility with management because the other airlines knew it could not financially sustain a long strike. For this reason, the Major Contingency Fund was created with a concomitant increase in annual membership dues from 1.35% to 2.35% of each member's airline earnings. It was from this fund that some expenditures, beginning in 1985, were made to support the striking pilots at Continental and United. Plaintiffs attack the fund as an improper expenditure of the dues of the objecting plaintiffs. Again the court finds the creation of the fund to be a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.

Moreover, after the Association reached a favorable strike settlement with United, it was able to negotiate similar agreements with other airlines. The district court's findings that all of these strike-related expenditures were germane accord with the policy underlying charging agency fee-payers for germane expenses "to ensure that those who enjoy union-negotiated benefits contribute to their cost." *Communication Workers v. Beck*, — U.S. —, 108 S.Ct. 2641, 2649, 101 L.Ed.2d 634 (1988).

The objecting pilots have not shown that they did not benefit from the Association's financial support of the strikes at Continental and United or that they will never benefit from the contingency fund. Instead, they argue that *Ellis* not only defined the criteria for assessing germaneness, but also significantly narrowed the category of union expenses that could permissibly be charged as germane. They assert that the Supreme Court, by referring to "employees in the bargaining unit," 466 U.S. at 448, 104 S.Ct. at 1892; intended to limit the expenses assignable to an agency fee-payer to costs incurred only by his relevant bargaining unit.

Ellis does not support the restrictive reading that the objecting pilots assign to it. In *Ellis* the Court analyzed which types of expenditures could be charged against nonmembers' fees. It did not decide how a national union must allocate the expenditures that are germane to bargaining among the bargaining units it represents. That issue was not presented in *Ellis*. Nevertheless, the Court's discussion of the types of expenditures that can be charged against nonmembers' fees is instructive. Significantly these expenditures were not limited to individual bargaining units. The Court held that nonmembers' fees could be used to pay their proportional share of the union's national conventions. 466 U.S. at 448-49, 104 S.Ct. at 1892-93. The Court also approved the expenditure of agency fees by the national unions for the purchase of refreshments at union business meetings and occasional social activities. It observed that while these affairs are not central to collective bargaining, they are sufficiently related to it to be charged to all employees. 466 U.S. at 449, 104 S.Ct. at 1893. Another national expenditure not confined to any particular unit was for a monthly magazine. The Court held that the union could charge nonmembers for their share of the costs of publication about activities germane to bargaining, but it could not charge them for the costs of publishing articles about activities for which no contribution could be levied. Again, the distinction the Court drew was between the types of expenditures—not whether the cost should be allocated to the specific unit in which an employee worked. 466 U.S. at 450-51, 104 S.Ct. at 1893-94. The Court also distinguished between litigation involving the negotiations of agreements or settlement of grievances, which can be charged to nonmembers, and litigation that does not involve these subjects, which cannot be charged to nonmembers. 466 U.S. at 453, 104 S.Ct. at 1895. The Court held that organizing expenses, even within the bargaining unit, could not be charged to nonmembers, but this category of expenditures is not an issue here.

Applying *Ellis* to the analogous provision for agency shop contracts under the National Labor Relations Act, this court has recognized that agency fees may be allocated to expenses of

both a national union and its locals. *See Beck v. Communication Workers*, 776 F.2d 1187, 1210-13 (4th Cir.1985), *reh'g en banc*, 800 F.2d 1280 (4th Cir.1986), *aff'd* — U.S. —, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988).[1] In *Beck*, we held that a union could not charge agency fee-payers for its political and lobbying expenses, community service and charitable donations, and expenditures in support of strikes by other unions in other industries. *See* 776 F.2d at 1210-12. We suggested that unions could charge fee-payers for properly documented collective bargaining expenses, as well as for grievance and contract administration expenses. *See* 776 F.2d at 1212-13.

The district court's factual findings about the purpose of the expenditures for strikes and a contingency fund and effect of these expenditures on all units where the Association is the bargaining agent demonstrate that the expenditures satisfy the test *Ellis* prescribes. They were "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the employer in labor-management issues." 466 U.S. at 448, 104 S.Ct. at 1892.

II

Addressing the objecting pilots' claims for refunds of fees they had paid, the district court held that the six-month statute of limitations for actions alleging breach of a union's duty of fair representation barred recovery for all claims arising prior to March 3, 1987. The pilots argue that Virginia's two-year statute of limitations for personal injuries applies because they are asserting a constitutional claim.

Regardless which statute of limitations is applied, the pilots' claims are not barred. The statute of limitations began to run,

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[1] The rehearing *en banc* dealt with the issue of federal jurisdiction and the Supreme Court affirmed on that ground. The panel's disposition of the fee-allocation issue was not disturbed by the *en banc* court. *See* 800 F.2d at 1282.

with respect to the 1985 agency fees, on September 11, 1986, the date that the 1985 rebate and rebate report were distributed. The Association does not dispute that the dissenting pilots objected in a timely fashion to the 1985 rebates, in accordance with the Association's rebate objection procedures. The parties then entered arbitration, and the statute of limitations was tolled during the arbitration proceedings. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir.1987); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1510 (9th Cir.1986) (duty of fair representation claim "tolled while good faith attempts are made to resolve that claim through grievance procedures"); *cf. Trent v. Bolger*, 837 F.2d 657, 659-60 (4th Cir.1988). The parties then agreed to stay arbitration pending this litigation. This suit was filed on September 3, 1987, within either a six-month or a two-year statute of limitations. The additional claims, based upon 1986 and 1987 agency fees, arose after the commencement of the litigation.

III

In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Court explained the procedural safeguards required by the First Amendment for "'preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.'" 475 U.S. at 302, 106 S.Ct. at 1074. *Hudson* involved a public employer and public employees. The Association takes the position that the state action, and the consequent applicability of the first amendment, that concerned the Court in *Hudson* is not involved here because airline transportation is a private industry.

The Association acknowledges that in 1956, the Supreme Court held directly to the contrary, ruling that "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction."

Hanson, 351 U.S. at 232, 76 S.Ct. at 718. The Association contends, however, that recent Supreme Court decisions have called into question whether the definition of state action is so broad as to encompass the kind of private collective bargaining agreements here in issue.[2]

We cannot accept the Association's argument. The Supreme Court has not repudiated *Hanson*. In *Ellis*, 466 U.S. at 439, 104 S.Ct. at 1887, the Court assumed the continuing validity of *Hanson*, as it did in *Beck*, 108 S.Ct. at 2656-57. We therefore conclude that unions with agency shop agreements authorized by the Railway Labor Act must provide agency fee objectors the same procedural safeguards prescribed by *Hudson* for objectors in the public sector.

IV

In *Hudson*, the Supreme Court enunciated a three-part constitutional test that must be satisfied by a union plan for the collection of agency fees from nonmembers. These safeguards were intended to ensure that unions operating under agency shop contracts would not "collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective bargaining agent." *Ellis*, 466 U.S. at 447, 104 S.Ct. at 1892. The Court specified

> that the constitutional requirements for the Union's collection of agency fees include an adequate explanation for the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial

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[2] The Association relies on *Blum v. Yaretsky*, 457 U.S. 991, 1002-12, 102 S.Ct. 2777, 2784-90, 73 L.Ed.2d 534 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839-43, 102 S.Ct. 2764, 2770-73, 73 L.Ed.2d 418 (1982); *United Steelworkers v. Weber*, 443 U.S. 193, 200, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-66, 98 S.Ct. 1729, 1737-39, 56 L.Ed.2d 185 (1978); and *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974).

decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson, 475 U.S. at 310, 106 S.Ct. at 1078. An adequate explanation requires verification by an independent auditor. 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. The district court held that the procedure adopted by the Association after *Hudson* complied with that case's requirements. It held that procedure in effect before *Hudson* was decided substantially complied.

In conformity with *Hudson*, the Association relies on independently audited financial statements to divide its expenses from the previous year into those that are germane to collective bargaining and those that are not. The report of germane and nongermane expenses is sent to every agency fee-payer by May 31. The district court found that the rebate calculation report of 29 pages for 1986 which was distributed in 1987 gave an adequate explanation of the basis of the fee. This finding is not clearly erroneous.

Any pilot who has a complaint about the application of the Association's policies and procedure pertaining to rebates may request that his complaint be submitted to an independent arbitrator. At a pilot's request, the amount in dispute is escrowed pending arbitration. Unless the parties otherwise agree, the selection of the arbitrator and the procedures of arbitration will be governed by the American Arbitration Association rule for impartial arbitration of union fees. The Air Line Pilots Association will pay the fees and expenses of the arbitrator. The plan's provision for arbitration satisfies *Hudson*.

Each year the Association deposits in an interest-bearing escrow account 150 percent of the estimated amount of its rebate obligation. As allowed by *Hudson*, the Association bases this estimate on the previous years' experience. *See* 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18. It also considers budget projections and any other available information. Experience has shown the escrowed amount to be sufficient. *Hudson* does not

require that 100 percent of the agency fees be escrowed pending rebate. 475 U.S. at 310, 106 S.Ct. at 1078.

The Association defends its interest-bearing escrow provision by reliance on *Ellis*, where the Court held that "advance reduction of dues and/or interest-bearing escrow accounts" are acceptable. 466 U.S. at 444, 104 S.Ct. at 1890. Courts differ over the question whether *Hudson* now requires advance reduction of agency fees for political and ideological expenditures. *Compare Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir.1987) (advance reduction required) *with Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 338-40 (2d Cir.1987) (escrow sufficient). *Hudson*, like *Ellis*, condemns the failure to pay interest on rebates. 475 U.S. at 303-06, 106 S.Ct. at 1074. But *Hudson* does not expressly or impliedly overrule *Ellis* with respect to providing an interest-bearing escrow account as an alternative to advance reduction. This court has interpreted *Ellis* to permit an escrow-and-rebate plan. *See Beck*, 776 F.2d at 1213-14. Relying on *Ellis* and *Beck*, we reject the contention that the Association's plan is deficient because it does not provide for advance reduction of agency fees.

Actually, the Association currently operates a hybrid reduction-escrow system. The airlines treat all employees, union and nonunion, uniformly with regard to checkoff. But nonmembers may opt out of checkoff and pay their fees monthly. The Association pays a lump sum rebate with interest when it distributes its Report of Germane and Non-Germane Expenses. In addition, the Association reduces monthly payments of nonmembers who have made a timely request and whose fees are not checked off. The advance reduction is based on the current year's estimated ratio of germane and nongermane expenses. A year-end adjustment is made after the actual ratio is determined. This procedure, we believe, fully satisfies *Hudson*'s concerns that a union not exact an involuntary loan from a nonmember for nongermane expenditures.

The Association's plan in effect for 1985, before *Hudson* was decided, was designed to comply with *Ellis*, which was

decided in 1984. The Association deposited its estimated obligation for rebates in an interest-bearing escrow account. It furnished a copy of the expenditure report to nonmembers who gave notice that they did not wish to pay any nongermane expenditures, but it did not send the report to other fee-payers. This plan provided for arbitration.

We agree with the district court that the plan was sufficient. The eight-page explanation of germane and nongermane expenditures was adequate. No nonmember has shown prejudice because he did not receive the report. Although the report was not circulated as promptly as the present plan envisions and the opportunity to arbitrate was delayed, the district court found that no specific damage to any pilot because of delay has been shown. In fact, when arbitration began, the parties mutually agreed to suspend the proceedings pending the outcome of this case.

We agree with the district judge on all issues except the application of the statute of limitations. The district court's ruling about limitations had no effect on the outcome of the case, however, for alternatively the district court properly found no merit to the objections about procedures.

AFFIRMED.

APPENDIX C

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, with attached STIPULATED FACTS

March 25, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PETER CRAWFORD, et al.,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CIVIC ACTION
	)	NO. 87-891-A
	)	
AIR LINE PILOTS ASSOCIATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This action is brought by forty-two commercial airline pilots employed at nine different airlines which have or had agency shop agreements with the defendant Air Line Pilots Association (ALPA). Under these agreements the plaintiffs, who are not members of ALPA, are required, as a condition of continued employment, to pay agency-fees to ALPA. The collective bargaining agreements which these airlines have with ALPA contain union security provisions permitted by § 2 Eleventh of the Railway Labor Act (RLA), 45 U.S.C. § 152 Eleventh. The plaintiffs here, in much the same manner that the plaintiffs did in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), challenge the adequacy of the rebate scheme employed by ALPA and the legality of burdening these objecting plaintiffs with certain union expenses.

The challenges are made on both a statutory and a constitutional basis. The statutory challenge is that § 2 Eleventh, as construed by the Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v.*

Allen, 373 U.S. 113 (1963), prohibits burdening the objecting plaintiffs for expenses such as those involved here because they are not "germane to collective bargaining." *Id.* at 121, 122.

The consitutional [sic] argument is that the First Amendment limits the use to which the union can put funds obtained from dissenting employees. Because this case, in the court's view, can be decided on a statutory basis, and because any interference with First Amendment rights is no greater than that already resulting from the compelled contribution to the union, the court will not address the constitutional issue.

The court in *Ellis* seemed to approve First Amendment protection to employees in the private sector. Although raised by the defendant, the court need not address the issue here.

The parties have entered into a comprehensive Stipulation, attached as Appendix A, which obviated the need for much additional evidence. The court adopts that stipulation, with the facts found in this opinion, as its findings of fact.

The first issue raised by the plaintiffs is whether the rebate system of ALPA is adequate when tested by the requirements of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Since that case involved governmental action, it was clearly governed by First Amendment principles and thus may not be apposite. Nonetheless, assuming *Hudson* applies, the court finds that the rebate system adopted in November of 1987 clearly meets its requirements and that the rebate system adopted for 1986 substantially satisfies *Hudson*. Insofar as the advance reduction (the first *Hudson* requirement) is concerned, the procedures adopted in November of 1987 (which take effect after May, 1988) allow an advance reduction for any objecting pilot who requests it in the form of a credit on the billings he receives.

The second requirement of *Hudson*, namely, an adequate explanation of the basis for the agency fee (with verification by an independent auditor) has also been satisfied. The explana-

tions for the 1985 and 1986 rebate calculations (DX 29 and 30), particularly the latter, show more than adequately the basis for the agency fee rebate. Indeed, the court finds from the overall testimony of the plaintiffs who testified that their objection to the explanation was not that they did not know where the money was going, but that they did not see how the expenditures that were made would benefit them. In addition, ALPA has employed Price Waterhouse as an independent auditor to verify the basis for the agency fees.

The third requirement of *Hudson*, namely, a reasonably prompt opportunity to challenge the fee amount before an impartial decisionmaker, is satisfied by the arbitration provision in the agreement which permits, if it indeed does not require, arbitration pursuant to the rules of the American Arbitration Association. The plaintiffs' quarrel with the procedures under the American Arbitration Association rules as to lack of discovery does not change this.

Finally, although the arbitration procedure did not provide until 1987 for an escrow fund for amounts reasonably in dispute (the fourth requirement of *Hudson*), an escrow fund for agency fee objectors has been in existence since 1984. Since the amounts paid into the fund have been greater than the amounts estimated to be in dispute, this requirement is satisfied.

Thus the court finds that the procedures for the year 1987 are well within the requirements of *Hudson*, and the procedures for the year 1986 substantially within them. For the years prior to 1985 there may have been deficiencies; however, no specific damage to any plaintiff as a result of any deficiency in the rebate program itself has been shown, and the court is unwilling to require an audit, notice, or an opportunity to object on the possibility that there may be revealed some inappropriate expenditures warranting additional rebates.

Moreover, and more importantly, the six month statute of limitations bars these plaintiffs' claim for monetary relief for any claim arising prior to six months before this action was filed, i.e.,

prior to March 3, 1987. In *Delcostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court held that the applicable statute of limitations for breach of contract/duty of fair representation claims brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, was the six-month limitations period for filing an unfair labor practice charge under § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). Based on this ruling, the Fourth Circuit has held that a suit to enforce a union's duty of fair representation under the RLA is subject to the six-month limitations period of NLRA. *Triplett v. Brotherhood of Railway Clerks*, 801 F.2d 700, 702 (4th Cir. 1986). The Fourth Circuit has also held that suits under § 158(a)(3) of the NLRA by non-union members challenging union expenditures of the agency fees are based on the duty of fair representation. *Beck v. Communications Workers*, 800 F.2d 1280 (4th Cir. 1986)(en banc), *cert. granted*, 107 S.Ct. 2480 (1987). Since § 158(a)(3) of the NLRA is nearly identical to § 2 Eleventh of the RLA, it is only logical to construe suits under § 2 Eleventh of the RLA as based upon the duty of fair representation as well and to apply the six-month limitations period.

Plaintiffs' second claim is that under *Ellis*, expenses for certain union activities, namely, the support of the pilots' strikes at United Airlines and Continental Airlines, which amounted to $10,415,189 in 1985, $3,431,477 in 1986, and $1,896.984 [sic] in 1987, were improper. The propriety of these expenditures under *Ellis* is determined by whether they were expenses for "activities or undertakings normally or reasonably employed to implement or execute the duties of the union as exclusive representative of the employees in the bargaining unit." 466 U.S. at 448. Plaintiffs argue that expenditures for support of strikes with airlines other than the ones that employed them, and that iuncludes [sic] Continental and United, does not meet this test. The court is convinced that *Ellis* should not be given such a narrow reading. Indeed, *Ellis* itself notes that the union must have "a certain flexibility in its use of compelled funds." 466 U.S. at 456 (quoting *Street*, 367 U.S. at 778, that [T]he

furtherance of the common cause leaves some leeway for the leadership of the group").

Since deregulation of the airlines in 1978, bargaining by ALPA with the individual airlines has become essentially concession bargaining. Prior to deregulation, and to a certain extent thereafter in an era of rising wages, it was the union's position to bargain an employer up to the last and best union accomplishment with a prior employer. More recently, management has undertaken to extract concessions for one airline and then seek to use that concession as a leverage to bargain for more union concessions in subsequent bargaining.

The uncontroverted testimony of the defendant's witnesses establishes that collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some cost-cutting concession from ALPA, other airlines generally seek to obtain the same or an equivalent concession. On the other hand, when ALPA succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.

Consequently, it was important to ALPA, in the interest of all the pilots which it represented, to ensure that what had happened at Continental, namely, a bankruptcy whereby the collective bargaining agreement was abrogated and pilots' salaries were cut in half, not become an industry norm to be sought by other airlines in the bargaining process. For this reason it was in the interest of all pilots, members and nonmembers alike, that ALPA used its funds to pay the pilots at Continental to make up for their lost wages.

Similarly, in 1985, United sought in bargaining to impose a concession which American Airlines had achieved, namely, a B-Scale two-tier payment arrangement under which airline cockpit personnel hired after a certain date would be paid on a lower pay scale (the B-Scale). ALPA supported financially the

pilots who struck United, and ultimately, after a twenty-nine day strike, secured from United a six year parity requirement under the B-Scale arrangement. This accomplishment has been used to benefit all members (and non-members) in all the airlines, not just those employed by United.

The United and Continental strikes considerably weakened ALPA's financial stability. Since a financially weak ALPA was vulnerable to a prolonged strike, ALPA lost its credibility with management because the other airlines knew it could not financially sustain a long strike. For this reason, the Major Contingency Fund was created with a concomitant increase in annual membership dues from 1.35% to 2.35% of each member airline's earnings. It was from this fund that some expenditures, beginning in 1985, were made to support the striking pilots at Continental and United. Plaintiffs attack the fund as an improper expenditure of the dues of the objecting plaintiffs. Again the court finds the creation of the fund to be a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.

The plaintiffs argue that under the test suggested by the defendant, almost every expenditure the union would make (other than organization, political and charitable expenses) could be traced so as to have a benefit, albeit indirect, to all members (and non-members). And there undoubtedly will be expenditures that have such a remote impact on one pilot's collective bargaining unit that it constitutes an improper burden on his or her dues. But the expenditures specifically challenged in this complaint, namely, the expenditures to support the striking pilots at United and Continental, are not remote. Those expenditures are directly beneficial to the bargaining unit of each plaintiff.

In sum, the court finds that the rebate scheme employed by ALPA meets the requirements imposed by *Hudson* and that the union expenditures to support striking pilots and to create a major contingency fund were reasonably employed to implement

the duties of the union as exclusive representative of the employees in the bargaining unit.

/s/
United States District Judge

Alexandria, Virginia
March 25th, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PETER CRAWFORD, et al.,	**[Clerk's stamp omitted in printing]**
Plaintiffs,	CIVIL ACTION
- vs -	No. 87-0891-A
AIR LINE PILOTS ASSOCIATION,	
Defendant.	

STIPULATED FACTS

The parties enter into the following stipulations for purposes of this litigation only.

Background

1. Defendant Air Line Pilot Association (ALPA) is a labor organization that represents commercial airline pilots employed by most United States airlines. ALPA currently represents approximately 37,000 pilots on some 43 airlines. Approximately 34,500 of those pilots are members of ALPA.

2. Since 1936, labor-management relations in the airline industry have been regulated by the Railway Labor Act (RLA), 45 U.S.C. § 151 et seq (1982). In 1951, the RLA was amended to permit carriers and labor organizations to enter into union security agreements. RLA § 2 Eleventh, 45 U.S.C. § 152 Eleventh.

3. Twenty-two airlines with which ALPA bargains, including those employing the plaintiffs, have signed collective bargaining agreements containing union security provisions. Each contains an "agency shop" provision that requires the pilots covered by the agreement either to become a member of ALPA or to pay ALPA a "service fee" equivalent to ALPA's dues, and also—under some contracts—initiation fees and/or assessments. ALPA's dues are 2.35 percent of a member's airline earnings; although pilot earnings vary greatly, the average ALPA member earns approximately $80,000 per year and pays approximately $1,880 in dues.

4. At the present time, approximately 1400 pilots, including the plaintiffs, who are covered by ALPA agency shop agreements have chosen not to become members (or have resigned their membership) and are currently paying agency-fees to ALPA.

5. The plaintiffs are forty-two commercial airline pilots employed at nine different airlines[1] which have (or had) agency shop agreements with ALPA. Pursuant to those agreements, the plaintiffs are required, as a condition of continued employment, to pay agency-fees to ALPA.

ALPA's Organizational Structure

6. ALPA is a unitary national labor organization. It is not composed of local unions like most other labor organizations; all ALPA members belong only to one organization and pay their dues (or agency-fees) only to ALPA. Def Ex 1 is ALPA's Constitution and By-Laws, as revised November 19, 1986. The governance structure of ALPA can be summarized as follows:

(a) Airlines station their pilots at domiciles (bases) and ALPA establishes a Local Council for each domicile of an air-

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[1] Braniff, Eastern, Midway, Northwest, Pan American, Trans World, United, USAir, and Western. In April of 1987 Western merged with Delta.

line. The pilots assigned to that domicile elect Local Council representatives for each pilot position—i.e., captain, first officer, second officer—stationed at that domicile. All of the local council representatives at each airline constitute the "Master Executive Council" (MEC) for that airline. Each MEC elects a Chairman, Vice-Chairman, and Secretary-Treasurer. The MECs have authority to expend monies within the limits established by ALPA's Annual Budgets. See Plt Exs 2, 13, 41 and 42 (ALPA Budgets for 1985, 1986, 1987 and 1988) and Plt Exs 4 and 15 (ALPA Spending Limits for 1985 and 1986).

(b) All of the MEC's at all of the airlines constitute ALPA's Board of Directors, which is its highest governing body. The Board of Directors elects four national officers—President, First Vice President, Secretary, and Treasurer—and five Executive Vice Presidents. These officers are also *ex officio* members of the Board of Directors.

(c) The four national officers and five Executive Vice Presidents constitute ALPA's Executive Committee.

(d) The four national officers and the Chairmen of all of the MEC's constitute ALPA's Executive Board.

7. ALPA employs a staff of approximately 300 persons, who are organized into 12 separate departments, each of which is headed by a director. All of the directors report to the President on substantive matters, and to a General Manager on administrative matters. The twelve departments are: Representation, Legal, Engineering and Air Safety, Accident Investigation, Legislative Affairs, Communications, Retirement and Insurance, Finance, Office Administration, Information Systems, Human Resources, and Organizing. Most of the staff works at one of ALPA's two headquarters offices in the Washington, D.C. area—one located in Washington proper and the other located just outside Washington in Herndon, Virginia. In addition, ALPA has local offices scattered throughout the country which are used by MEC officers and by ALPA's field

staff. A list of ALPA's local offices is Def Ex 3 and ALPA's Organizational Chart is Def Ex 2.

ALPA's Collective Bargaining Activities

8. ALPA's collective bargaining activities are to a large extent directed and coordinated by its national officers and governing bodies. Broad bargaining goals and policies are established by ALPA's Board of Directors and Executive Board, and are binding on the entire organization. A standing committee of the Executive Board, known as the Collective Bargaining Committee, conducts an ongoing study of a wide range of matters relating to collective bargaining, collects and publishes all of ALPA's collective bargaining policies, and recommends changes in those policies.

9. Under Article XVIII of ALPA's Constitution & By-Laws, all collective bargaining negotiations and agreements must be approved by its President. The actual negotiations at each airline are conducted by a Negotiating Committee selected by the MEC at that airline, and are assisted by a professional negotiator employed in ALPA's Representation Department who reports regularly to the President on the progress of such negotiations. There are periodic conferences of all Negotiating Committee Chairmen at which they exchange information on what is happening at their respective airlines and receive briefings from ALPA's national officers and staff. ALPA also has a staff of economic and financial analysts who collect data and perform studies relevant to collective bargaining, as well as a staff of pension and insurance experts to assist in the administration and negotiation of agreements relating to retirement and insurance benefits.

10. In September 1983, Continental Air Lines declared bankruptcy under Chapter XI of the Bankruptcy Act, unilaterally abrogated its collective bargaining agreements with ALPA and all its other unions, and cut the wages of its pilots and other employees by approximately 50 percent. ALPA and the other unions responded by going on strike against Continental. In

October 1983, ALPA conducted a secret-ballot referendum vote of its membership concerning a proposed strike-benefit assessment that would pay striking Continental pilots a monthly benefit of $3,800 for captains and $2,500 for first and second officers. The estimated monthly cost of these benefits was $4,513,700, which would be paid by monthly assessments based on pilot income. The assessment was approved by 77.1% of the pilots voting. In subsequent referendums held in October 1984, January 1985, and August 1985, the membership reaffirmed its support for the assessment, with various adjustments in the amount of the benefit and the amount of the assessment. The assessments remained in effect until February 1986.

11. In the same year that Continental declared bankruptcy, abrogated its labor contracts, and reduced wages, American Airlines—whose pilots are not represented by ALPA—was able to obtain an agreement from its pilot union providing that pilots hired after a certain date would be paid on a lower pay scale (called the "B-Scale") than pilots hired before that date. These wage-cutting actions by Continental and American, as well as the economic pressures resulting from airline deregulation, caused other airlines to demand wage concessions from ALPA to enable them to compete more effectively.

12. One of the carriers that sought concessions from ALPA was United Air Lines, which negotiated with ALPA in 1985. One of the key issues was United's demand for a two-tier wage structure similar to that at American Airlines. ALPA's position on this issue was that it would not agree to a B-Scale for captains, and that any B-Scale for first or second officers would have to merge with the A-Scale within 5 years. The parties were unable to agree on these issues and a strike occurred at United in May and June of 1985. The strike was settled by an agreement that excluded captains from the B-Scale and provided that the B-Scale would remain in effect for 5 years. The settlement further provided that if the parties were unable to agree on what would happen to the B-Scale after 5 years, the issue would be submitted to final and binding arbitration. After reaching this settlement with United, ALPA was

able to obtain a similar agreement with TWA. ALPA was also able to obtain from all of the other carriers that sought B-Scales, an agreement to merge the B-Scale with the A-Scale after 5 years.

Creation of the Major Contingency Fund

[One of the issues in this case is whether objecting agency-fee payers may lawfully be compelled to contribute to ALPA's Major Contingency Fund.]

13. By mid-1985, the costs of the Continental and United strikes/disputes had caused ALPA to use up most of its liquid resources and incur substantial debt. In June, 1985, ALPA's Board of Directors held a special meeting to consider ways to replenish ALPA's financial strength and improve its ability to finance major strikes like those at Continental and United. At that meeting, the Board of Directors adopted a resolution (Def Ex 10) which called for

(a) an increase in annual membership dues[2] equal to 1% of each member's airline earnings (i.e., dues raised from 1.35% to 2.35%), and

(b) the use of the additional dues revenue to create a "Major Contingency Fund" to be used exclusively for major labor disputes or other expenditures "that cannot be funded by normal Association budgeting practices and policies."

Expenditures from the Fund would require authorization by two-thirds of both ALPA's Executive Committee and Executive Board. In the event the Fund reached a balance of $100 million, any excess of that amount would be returned to the membership and agency-fee payers on a pro rata basis. The Board of Directors submitted its proposal concerning a dues

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[2] Since agency-fees were pegged to union dues, agency-fees were also increased by 1% of airline income.

increase and a Major Contingency Fund to a secret ballot mail vote of the ALPA membership. The membership approved the proposal, and it became effective in October 1985 thereby raising ALPA's membership dues (and agency-fees) to 2.35% of airline income and creating a Major Contingency Fund.

14. In May 1987, ALPA's Executive Board proposed that ALPA's dues structure be revised in certain respects, including a reduction of the amount allocated to the Major Contingency Fund from 1 percent to .5 percent. The proposal was submitted to the Board of Directors by mail ballot, and was approved in October 1987. The full text of the proposal as adopted is set forth in Def Ex 11.

15. ALPA's views on the reasons for the creation of the Major Contingency Fund, and the ways in which the existence of the Fund helps ALPA to achieve its collective bargaining goals, are set forth in an article entitled *Pilots' Investment In Themselves Levels The Playing Field*, which was published in ALPA's magazine, the *Air Line Pilot*, in July, 1987. A copy of that article is Def Ex 12.

16. In 1985, ALPA expended $10,415,189 from the Major Contingency Fund, some $8,479,689 in support of the pilots' strike at United Airlines and $1,935,500 in support of the pilots' strike at Continental Airlines. Plt Ex 5/Def Ex 19 and Plt Ex 21/Def Ex 13. At the end of 1985 there was a negative balance in the Fund of $4,588,756.

17. In 1986, ALPA expended $6,831,477 from the Major Contingency Fund, some $2,047,718 in support of the pilots' strike at United Airlines and $1,383,759 in support of the Continental strike, and $3,400,000 in preparation for a strike at Eastern Airlines. At the end of 1986, the Fund had a positive balance of $13,738,430. Plt Ex 21/Def Ex 13.

18. From January 1987 through November of 1987, ALPA expended $4,885,888 from the Major Contingency Fund, some $74,000 in strike related expenses at United Airlines; $1,822,984

in support of the Continental strike; $2,788,135 in preparation for a possible strike and other purposes at Eastern Airlines (including organizing expenses at affiliated carriers of Texas Air Corporation, the parent of Eastern Airlines); and $200,769 in organizing expenses at other carriers.[3] At the end of 1987, the Fund had a positive balance of $31,935,125. Plt Ex 2 Def Ex 13.

ALPA's Rebate Procedures

19. Since 1978, some agency-fee paying pilots have notified ALPA of their objections to the uses of their fees and have sought to limit their financial support to the minimum required by law. ALPA's policies and procedures for dealing with agency-fee objectors have evolved over time. ALPA's written policy entitled "Refunds on Political Expenditures" that was in effect from November 1979 through January 1986 is contained in Plt Ex 3/Def Ex 14.

20. During the period from 1978 through 1983 and in response to objections, ALPA rebated to each objector a percentage of the agency-fee paid, plus interest, based on ALPA's computation of the percentage of its expenditures that ALPA considered to be for political purposes. The rebate percentages for 1978 through 1983 varied between 0.54 and 0.76 percent of agency-fees.

21. In 1984, following the U. S. Supreme Court decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), ALPA revised its procedures for calculating agency-fee rebates. Plt Ex 1/Def Ex 22 is a copy of ALPA's "Procedures for Calculation of Rebate for 1984 and Subsequent Years." In June of 1986 ALPA paid the 1984 rebate which was 2.33 percent of the agency-fee.

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[3] ALPA has agreed that the organizing expenses are rebatable and will be included in its 1987 rebates. See¶ 50 infra.

22. In November 1984, ALPA established an interest-bearing escrow account into which it has subsequently deposited a portion of all objectors' agency-fees for each year. ALPA escrows 150 percent of the amount it estimates it will have to rebate at the end of any objection year. Plt Ex 39 is a summary of the transactions in the escrow account since 1984 and Plt Ex 40 is the account statement as of November 30, 1987.

23. In regard to the rebates for years 1978 through 1984, ALPA did not have any formal procedure by which objecting agency-fee payers could challenge the rebate before an impartial decision maker.

24. In January of 1986, ALPA's Executive Committee amended the policy regarding agency-fee rebates. Plt Ex 14/Def Ex 15.

25. Later in 1986, ALPA amended its rebate procedures to allow objecting agency-fee payers to challenge the amount of their 1985 agency-fee rebate through arbitration. Plt Ex 12. ALPA has subsequently made arbitration a formal part of its agency-fee rebate policy. See Def Exs 16, 17 and 18.

26. In making its rebate computations, any expenditures including expenditures from the Major Contingency Fund, that ALPA considered germane to collective bargaining have been charged to all agency-fee payers, regardless of the airline or airlines involved.

27. For years 1978 through 1987, ALPA did not make an advance reduction of agency-fees to take into account the amounts its prior years' rebate calculation indicated were not chargeable to objecting agency-fee payers.

28. In November 1987, ALPA revised its "Policies and Procedures Applicable To Agency-fees" and a copy of the revised procedures were distributed with ALPA's 1986 Rebate Calculation Report to all agency-fee payers. Def Ex 18. Pursuant to that policy, agency-fee payers who object to the

1988 (or subsequent years) agency-fees may obtain an advance reduction of their agency-fees for activities not germane to collective bargaining. Plt Ex 19/Def Ex 31.

29. The financial information that ALPA has used to compute its agency-fee rebates is obtained from accounting records that are kept in the ordinary course of business. ALPA's accounting system keeps track of expenditures not only in terms of traditional accounting categories but also in terms of the particular "project" for which each expenditure is incurred. For example, salary expenditures are recorded not only as "salaries," but are also charged to the various "projects" on which each employee has worked. Employees are required to fill out a time sheet each week identifying the projects on which they worked and the amount of time devoted to each project each day. These time sheets are reviewed and approved by each employee's supervisor, and then submitted to ALPA's accounting department. The accounting department allocates all salaries and other employment costs to the various projects on which each employee worked, in proportion to the amount of time the employee spent on each project as reflected on the time sheets. A similar procedure is used for all other expenses. ALPA's various requisition and expense-voucher forms all require a notation of the particular project for which each expenditure is incurred, enabling the accounting department to keep track of the amounts spent on each project. At any one time ALPA has approximately 600 active projects, and new ones are opened whenever necessary.

30. Plt Exs 44-47 are 1985 computer reports generated by ALPA's accounting system and used by ALPA management to track and analyze the costs of its projects and departments. Reports similar to Plt Exs 44-47 are prepared monthly. Plt Ex 44 provides a report of the "Total Project Costs By Project" in 1985. Plt Ex 45 provides a Summary of 1985 Project Expenses by Department, which have been adjusted to include an allocation of unassigned overhead costs (Project 000). Plt Ex 46 provides an airline by airline summary of those 1985 project

expenses which ALPA's accounting system tracks by airline.[4] Plt Ex 47 provides a Summary of 1985 project expenses that were charged to the United Airlines MEC for budgetary purposes.

31. Each year, ALPA's Director of Finance, James Herzog, and an attorney from ALPA's legal department, review each of the projects to determine which ones involve activities germane to collective bargaining and which do not. Mr. Herzog is generally familiar with most of the projects, but when he has needed additional information about a particular project he has requested it from the appropriate Department Director who is knowledgeable about that project. The attorney working with Mr. Herzog assists in deciding which projects are germane to collective bargaining and which are not.

The 1985 Agency-Fee Rebate

32. In 1985 there were 214 objecting agency-fee payers, including twenty-six of the plaintiffs. Plt Ex 7.

33. In 1986 ALPA began computing the 1985 rebate. Plt Exs 8, 9, and 10 and Def Ex 23 are working papers used by ALPA in determining the 1985 rebate. Def Ex 23 is a computer spreadsheet used by ALPA to initially separate its 1985 project expenditures of $45,494,132 into 6 categories: Negotiations ($23,639,724), Grievances ($1,547,754), Representation ($580,367), Union Administration ($5,207,359), General ($11,360,173), and Rebatable ($3,158,753). In addition to these project expenditures, ALPA also spent $3,537,333 in United strike benefits which were not charged to any project in 1985, and incurred $1,665,639 in overhead costs reported in an account identified as Project 000. Def Ex 24. ALPA's total expenditures in 1985 were $50,697,105.

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[4] ALPA objects to the admission of Exhibit #46 on the grounds that it was not included on the Original Exhibit List and is irrelevant to the issues.

34. After segregating its 1985 expenditures into the six categories described above, ALPA's Director of Finance, with assistance from ALPA's legal department, further reviewed the project expenditures of $3,158,753 in the "Rebatable" category and decided what amounts, if any, of these project expenditures were actually rebatable to objecting agency-fee payers. This review determined that $1,345,497 of its 1985 expenditures were not chargeable to objectors and should be rebated. See Def Ex 25 and Plt Ex 11/Def Ex 29.

35. In order to determine the rebate percentage to be applied to each objector's agency-fee, ALPA then divided the $1,345,497 of rebatable expenses by ALPA's *net* total expenditures of $50,038,560 ($50,697,105 of total expenditures minus $658,545 magazine/insurance income) for a rebate percentage of 2.69. Def Ex 25. This rebate percentage was then applied to the agency-fee paid by each objector to determine his or her rebate. Plt Ex 11/Def Ex 29.

36. On September 11, 1986, ALPA mailed the 1985 agency-fee rebate checks along with a copy of Plt Ex 11/Def Ex 29 (Rebate Calculations for 1985) and Plt Ex 12 (Cover Letter explaining the rebate and ALPA's newly adopted procedure for challenging the amount of the rebate through arbitration) to the 1985 objectors.

37. Copies of the 1985 Rebate Report and the ALPA cover letter were not mailed to the agency-fee payers who had not filed objections to the 1985 agency-fee.

38. The 1985 Rebate Report mailed to the objecting agency-fee payers did not contain a listing of all ALPA's 1985 projects and their costs.

39. Out of the 214 agency-fee payers who objected in 1985, 15 of them, identified in Def Ex 32, challenged the computation of the 1985 rebate and requested arbitration. Twelve of those requesting arbitration are plaintiffs in this lawsuit.

40. An arbitration hearing with respect to the 1985 rebate was convened on August 14, 1987, under the auspices of the American Arbitration Association (AAA). Mr. Gore, counsel for plaintiffs in this case, appeared at the arbitration on behalf of twelve of the participating objectors and announced that his clients believed that the AAA procedures for challenging agency-fees were unfair to his clients and that he would, in the very near future, file a class action challenging ALPA's agency-fee procedures. In view of Mr. Gore's position, it was agreed by the parties that the arbitration proceeding would be held in abeyance pending the outcome of this lawsuit. A transcript of the arbitration proceeding is Def Ex 33; a letter from the AAA confirming the status of the proceeding is Def Ex 34.

The 1986 Rebate

41. In 1986 there were 240 objecting agency-fee payers, including twenty-nine of the plaintiffs. Plt Ex 17.

42. On September 3, 1987, the plaintiffs filed this lawsuit challenging ALPA's agency shop procedures.

43. In late 1987, ALPA computed its 1986 rebate in the same manner as it had computed the 1985 rebate. Def Ex 26 is a copy of an ALPA computer spreadsheet separating its 1986 expenditures of $46,426,628 into 6 categories: Negotiations ($22,601,395), Grievances ($2,300,638), Representation ($1,893,603), Union Administration ($6,323,338), General ($10,579,110), and Rebatable ($2,728,541).

44. ALPA's Director of Finance, with the assistance of attorneys from ALPA's legal department, then determined that $1,583,896 of its expenditures were not chargeable to objectors and should be rebated. The rebate percentage of 3.39 % was determined by dividing the $1,583,896 of rebatable expenditures by its total 1986 expenditures of $46,775,833. ALPA's 1986 Rebate Calculation Report (Plt Ex 18/Def Ex 30) provides a detailed description of the procedures used as well as a detailed listing of ALPA's 1986 project expenditures.

45. Plt Exs 48 and 49 are reconciliation worksheets for 1986 prepared by ALPA's Director of Finance in order to reconcile the 1986 Rebate Calculation Report and the 1986 Financial Report.

46. On December 22, 1987, ALPA mailed a copy of its 1986 Rebate Calculation Report to *all* agency-fee payers.[5] Depending upon his or her status—objector, delinquent objector, objector with no current W2 on file, or an agency-fee payer who had not objected—each agency-fee payer received one of the cover letters prepared by ALPA to accompany its 1986 Rebate Calculation Report. Plt Ex 19/Def Ex 31a-d.

47. On January 27, 1988, Mr. Gore sent a letter to ALPA on behalf of all of the plaintiffs requesting arbitration of the 1986 rebate. This letter stated "This request for arbitration is not to be considered as a waiver of any of my clients' claims in the federal litigation and is filed solely to protect them in case the federal court should require that they must exhaust ALPA's procedures for challenging the 1986 rebate."

The 1987 Rebates

48. In 1987 there were 286 agency-fee payers who filed objections with ALPA, including thirty-seven of the plaintiffs. Additionally, three plaintiffs (Cross, Pederson, and Roark) became objectors by participating in this lawsuit. Plt Ex 28.

49. ALPA has not yet computed the 1987 agency-fee rebate.

50. In 1987, ALPA's Executive Board and Executive Committee authorized $1,238,500 for organizing purposes of which $200,769 had been spent as of November 30, 1987. Plt Ex 21/Def Ex 13. ALPA intends to treat these expenditures as

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[5] The 1985 Rebate Calculation Report was sent to only those agency-fee payers who had objected to the use of their agency fees.

not germane to collective bargaining and include them as rebatable expenses when it computes its 1987 rebate.

Samples of Plaintiffs' Challenges to Agency-Fees

[Each of the 42 plaintiffs have objected to ALPA's agency-fees in one or more years, either formally or by participating in this lawsuit. The following facts relate to the objections of three of the plaintiffs.]

51. Plaintiff Herbert A. Light is an airline Captain and long-time employee of Pan American Airways (PAA). In 1985 ALPA had an agency shop agreement requiring that all pilots in the bargaining unit either join ALPA or pay an agency-fee equal to ALPA's monthly dues. Captain Light was not a member of ALPA and chose to have his agency-fee paid automatically by dues checkoff. Plt Ex 22 contains an amended ALPA/PAA agency shop agreement requiring the payment of a service charge equal to ALPA's initiation fee, monthly dues and periodic assessments, including MEC assessments. In 1986, ALPA commenced billing Captain Light for Continental assessments.[6] Captain Light refused to pay the Continental assessments. Plt Ex 23, 25. On June 23, 1987, ALPA's Treasurer notified Captain Light that if he did not pay the $506.33 in delinquent Continental assessments, ALPA would have him discharged pursuant to the agency shop. Plt Ex 24. On August 10, 1987, Captain Light filed an objection with ALPA concerning the uses of his agency-fees. Plt Ex 26. ALPA acknowledged his objection on August 31, 1987. Plt Ex 27.

52. Plt Ex 31 is a Letter of Agreement between ALPA and Eastern Air Lines establishing an agency shop requiring that non-members pay an agency-fee equal to ALPA's monthly dues. Plt Ex 32 is a copy of the ALPA Eastern MEC's March 27, 1985 newsletter explaining the agency shop to the Eastern pilots.

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[6] Assessments are not subject to dues checkoff.

53. Plt Ex 33 is the correspondence between Plaintiff Peter A. Crawford (a flight engineer for Eastern) and ALPA concerning: his initial opposition to the Continental assessments on moral and religious grounds; his subsequent resignation from ALPA; and his continued protests of the uses to which ALPA spent his agency-fees.

54. Plt Ex 34 is a Letter of Agreement between ALPA and USAir establishing an agency shop requiring nonmembers to pay an agency-fee equal to ALPA's initiation fee, monthly dues and periodic assessments, including MEC assessments.

55. Plt Ex 35 is the correspondence between Plaintiff Donald K. Brewster (a Captain for USAir) and ALPA officials concerning his objections to the uses to which ALPA spent his agency-fees and ALPA's attempts to have him discharged for non-payment of agency-fees.

SO STIPULATED THIS 14th DAY OF MARCH, 1988.

/s/	/s/
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETER CRAWFORD, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Air Line Pilots Association (ALPA) respectfully submits this brief in opposition to the petition for certiorari. As we shall show, two of the issues raised in the petition were decided by the court below in a manner completely consistent with this Court's decision in *Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 (1991), and do not warrant plenary review. The remaining issue, relating to litigation costs, was not decided below at all, because the court of appeals concluded that it "simply has not been properly presented and preserved below, and therefore we express no view about it." (App. 10a). Certainly this Court need not concern itself with an issue that was not even decided in this case.

COUNTERSTATEMENT OF THE CASE

Nature of the Action

Petitioners in this case are 42 airline pilots who, at the time this case was filed, were employed by nine different airlines. Respondent ALPA is a national labor organization which represents the pilots on most of the nation's commercial airlines, including those on which petitioners were employed. ALPA's collective bargaining agreements with petitioners' airlines (as well as most others) included an "agency shop" provision requiring pilots who chose not to be members of ALPA to pay a service charge equivalent to ALPA's initiation fees, dues and (under some agreements) assessments.

Petitioners, who were not ALPA members, brought this action in the United States District Court for the Eastern District of Virginia to challenge ALPA's administration of its agency shop agreements. Their complaint was in two counts. First, it alleged that ALPA had failed to provide the procedural safeguards prescribed by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986). Petitioners have now abandoned this claim. Second, the complaint alleged that ALPA had improperly used petitioners' agency fees, over their objection, (1) to support strikes and bargaining activities at airlines other than those where petitioners were employed, and (2) to fund a "Major Contingency Fund" which ALPA had established to provide a reserve for major labor disputes and similar financial crises. Petitioners contended that, under this Court's decision in *Ellis v. Brotherhood of Ry. Clerks,* 466 U.S. 435 (1984), these were activities to which they should not be required to contribute.

Plaintiffs objected in particular to having to contribute to the costs of ALPA strikes at Continental and United Air Lines, but their basic contention was that they should not be required to pay any costs relating to collective bargaining at any airline other than their own.

Decision of the District Court

The case was submitted to District Judge Albert V. Bryan, Jr. largely on the basis of stipulated facts and exhibits, supplemented by oral testimony presented at a one-day trial. On March 25, 1988, Judge Bryan issued a Memorandum Opinion (App. 60a-66a), in which he incorporated by reference the parties' stipulation (App. 67a-82a).

Paragraphs 8 and 9 of the stipulation described how ALPA manages and conducts its collective bargaining:

> 8. ALPA's collective bargaining activities are to a large extent directed and coordinated by its national officers and governing bodies. Broad bargaining goals and policies are established by ALPA's Board of Directors and Executive Board, and are binding on the entire organization. A standing committee of the Executive Board, known as the Collective Bargaining Committee, conducts an ongoing study of a wide range of matters relating to collective bargaining, collects and publishes all of ALPA's collective bargaining policies, and recommends changes in those policies.
>
> 9. Under Article XVIII of ALPA's Constitution and By-Laws, all collective bargaining negotiations and agreements must be approved by its President. The actual negotiations at each airline are conducted by a Negotiating Committee selected by the MEC [Master Executive Council] at that airline, and are assisted by a professional negotiator employed in ALPA's Representation Department who reports regularly to the President on the progress of such negotiations. There are periodic conferences of all Negotiating Committee Chairmen at which they exchange information on what is happening at their respective airlines and receive briefings from ALPA's national officers and staff. ALPA also has a staff of economic and financial analysts who collect data and perform studies relevant to collective bargaining, as well as a staff of pension and insurance experts to assist in the

> administration and negotiation of agreements relating to retirement and insurance benefits.

(App. 70a).

The stipulation also described the collective bargaining disputes that led to the strikes at Continental and United Air Lines, toward which plaintiffs particularly objected to contributing. (App. 70a-72a). Based on the stipulated facts, as well as the oral testimony presented at trial, the district court found that these disputes affected labor relations throughout the airline industry:

> The uncontroverted testimony . . . establishes that collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some cost-cutting concession from ALPA, other airlines generally seek to obtain the same or an equivalent concession. On the other hand, when ALPA succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.
>
> Consequently, it was important to ALPA, in the interests of all the pilots which it represented, to ensure that what had happened at Continental, namely, a bankruptcy whereby the collective bargaining agreement was abrogated and pilots' salaries were cut in half, not become an industry norm to be sought by other airlines in the bargaining process. For this reason, it was in the interest of all pilots, members and non-members alike, that ALPA use its funds to pay the [striking] pilots at Continental to make up for their lost wages.
>
> Similarly, in 1985, United sought in bargaining to impose a concession which American Airlines had achieved, namely, a B-scale two-tier payment arrangement under which airline cockpit personnel hired after a certain date would be paid on a lower

> pay scale (the B-scale). ALPA supported financially the pilots who struck United, and ultimately, after a twenty-nine day strike, secured from United a six year parity requirement under the B-scale arrangement. This accomplishment has been used to benefit all members (and non-members) in all the airlines, not just those employed by United.

(App. 64a-65a).

Finally, the stipulation and trial testimony dealt with the nature and purpose of ALPA's "Major Contingency Fund". Based on this evidence, the district court found:

> The United and Continental strikes considerably weakened ALPA's financial stability. Since a financially weak ALPA was vulnerable to a prolonged strike, ALPA lost its credibility with management because the other airlines knew it could not financially sustain a long strike. For this reason, the Major Contingency Fund was created with a concomitant increase in [ALPA's] annual membership dues from 1.35% to 2.35% of each member's airline earnings. It was from this fund that some expenditures, beginning in 1985, were made to support the striking pilots at Continental and United. Plaintiffs attack the fund as an improper expenditure of the dues of the objecting plaintiffs. Again the court finds the creation of the fund to be a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.

(App. 65a).

Based on these findings, the district court concluded that the challenged expenditures met the standard of chargeability articulated by this Court in *Ellis*, 466 U.S. at 448, because they were for "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." (App. 63a, 65a-66a).

The Proceedings on Appeal

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. Their brief on appeal stated the issues presented with respect to Count 2 of the complaint as follows:

> Whether the district court—in deciding plaintiffs' Second Claim for Relief—erred in its interpretation of the U.S. Supreme Court decision in *Ellis* by holding:
>
> > (5) that nonunion pilots could be compelled to financially support ALPA strikes and activities in support of other bargaining units (Op. 6-8, App. 75-77); and
> >
> > (6) that nonunion pilots could be compelled to contribute to ALPA's one-hundred million dollar "contingency fund" (Op. 9, App. 78).[1]

(Petitioners' Court of Appeals Brief, pp. 2-3).

The case was initially argued before a three-judge panel, which issued a unanimous decision on March 19, 1989, affirming the district court's judgment. (App. 47a-59a). Petitioners then filed a petition for rehearing in banc, which was granted by the court. The case was reargued before the court in banc on October 3, 1989.

On June 11, 1990, this Court granted certiorari in *Lehnert v. Ferris Faculty Ass'n*, 110 S.Ct. 2616, *decided on the merits*, 111 S.Ct. 1950 (1991). The petitioners in that public sector case contended, as do petitioners here, that their bargaining representative "may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 111 S.Ct. at 1959 (1991).

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[1] These issues are numbered (5) and (6) because they were preceded by four other questions presented, numbered (1) through (4), relating to Count 1 of the complaint, which petitioners have now abandoned.

On June 27, 1990, the court of appeals entered an order deferring further action in the present case pending this Court's decision in *Lehnert*.

This Court issued its decision in *Lehnert* on May 30, 1991, holding "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 111 S.Ct. at 1961. The court of appeals then requested the parties to file supplemental briefs discussing the impact of *Lehnert* on the present case. After those briefs were filed, the court scheduled another in banc oral argument in February 1992 (perhaps because three new judges had been appointed since the 1989 argument).

The court of appeals issued its in banc decision on April 28, 1993. Both the majority opinion, written by Judge Butzner, and the concurring opinion, written by Judge Wilkinson, held that the case was controlled by *Lehnert*. As Judge Wilkinson put it:

> I vote to affirm the district court's judgment because I believe that we are required by *Lehnert v. Ferris Faculty Association*, 111 S.Ct. 1950 (1991), to do so. Judges are in the business of taking language seriously, and the language in *Lehnert* nails the result here to the mast.

Judge Russell dissented, in a lengthy opinion joined by four other judges. The dissent made three basic arguments:

(1) That some of ALPA's expenditures in connection with the Continental and United strikes were for litigation, and those costs should not have been charged to the plaintiffs.[2]

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[2] The majority had refused to address the issue of litigation costs, because "nowhere in appellants' complaint, the stipulation of fact, or the district court's findings is there any mention of extra-

(2) That some of the expenditures from the Major Contingency Fund had been for strike preparations at Eastern Airlines, and no evidence had been presented to show that the dispute at Eastern had any relationship to collective bargaining at petitioners' airlines.

(3) That the holding of *Lehnert* with respect to the chargeability of collective bargaining costs at other bargaining units is inapplicable to the costs of ALPA's strikes against Continental and United. The *Lehnert* rule is limited to "nonideological" costs, and the Continental and United strikes were not "nonideological" because they involved communications "directed outside the union." (App. 43a).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LEHNERT*.

Contrary to the views expressed by petitioners and by the dissenting opinion below, the decision in this case is entirely consistent with this Court's decision in *Lehnert*. In *Lehnert*, as here, nonunion employees contended that they should not be compelled by an agency shop agreement to pay for union activities "that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 111 S.Ct. at 1959. This Court, while divided over other issues in the case, was unanimous in its rejection of this contention. All of the opinions in *Lehnert* agreed that a national union can use agency fees collected from many bargaining units to finance its collective bargaining activities in all of those units, even if, in any particular year, some bargaining units will contribute more to the union's "pool of re-

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unit litigation expenses in this case. The issue simply has not been properly preserved below, and therefore we express no view about it." (App. 10a).

sources" than they receive in direct benefits from it. Justice Blackmun's opinion explained:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.
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> * * * *
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. . . . There must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization. . . . We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employee's unit.

111 S.Ct. at 1961-62.

The separate opinion of Justice Scalia, while disagreeing with the majority on various other issues, agreed with this aspect of the majority opinion. 111 S.Ct. at 1980-81.

As the court below held, the result in the present case follows naturally from *Lehnert*:

> ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargain-

> ing process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position at each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargained pattern and practice in the airline industry.

(App. 9a).

Petitioners accuse the court of appeals of having abandoned the standard that chargeable expenses must be "germane to collective bargaining," in favor of a requirement that the expenditure "enure to the benefit of the members of the local union by virtue of their membership in the parent organization." (Petition 15-16). In fact, both the district court and the court of appeals found the challenged expenditures to be "germane to collective bargaining," as the above excerpt from the court of appeals opinion makes clear.[3]

Judge Russell's novel argument that strikes must be considered "ideological" activities because they have "communicative content" directed outside the union is unconvincing. (App. 43a). While all union activities may be said to have some ideological dimension, strikes are pri-

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[3] Petitioners also argue that, "[w]hatever the appropriate test for determining the chargeability of the Continental and United strike expenditures, . . . ALPA's extra-unit donation of $1,100,000 to another union participating in the United strike can never be chargeable to objecting employees." (Petition 16). Petitioners never previously challenged this specific expenditure, so neither the district court nor the court of appeals addressed it. The sum in question was paid by ALPA to reimburse the United Air Lines flight attendants and their union for losses and expenses incurred as a result of their honoring ALPA's picket lines during its 1985 strike against United. This payment was part of the cost of the strike, and was just as "germane to collective bargaining" as any other strike expense.

marily an economic, not an ideological, activity, intended to bring pressure on the employer to accede to a union's bargaining demands. As such, they are an integral part of collective bargaining. It is hard to imagine any union activity more "germane" to collective bargaining than a strike that is called to break an impasse in collective bargaining negotiations.

Petitioners also contend, echoing another argument made by Judge Russell's dissent, that the court below "erred in upholding the chargeability of ALPA's 'extra-unit' expenditures in support of Eastern strike activity, i.e. 1986-87 strike preparations and the 1989 sympathy strike in support of another union." (Petition 16). They complain that ALPA "failed to present any evidence or proof that such expenditures were germane to collective bargaining." (*Id.*). It is not surprising that there was no evidence in this case concerning the "1989 sympathy strike" at Eastern, because the trial of this case took place in March 1988, more than a year before that strike began. Moreover, the issues in this case concerned ALPA's expenditures in 1985 and 1986. Thus, the 1989 Eastern strike was simply never in issue in this case.

The evidence did show that ALPA's *1986* expenditures from the Major Contingency Fund, which *were* in issue, included $3.4 million for Eastern strike preparations. (Court of Appeals Appendix 121). Those 1986 expenditures, however, were unrelated to the 1989 strike. ALPA's 1986 Rebate Report explained that these strike related expenses were incurred in 1986 in connection with the Eastern Airlines crisis, *where a strike was only narrowly averted.*" (*Id.* 98, emphasis added). The events at Eastern were not further discussed at trial, or in the opinion of the district court, because petitioners' attack was focused on the more costly Continental and United strikes.

The basic issue in this case was not whether petitioners could be charged with the costs of this or that specific strike, but whether they could be charged with *any* bar-

gaining or strike-related expenses at *any* airline other than their own. Based on all the evidence presented at trial, the district court ultimately found "that collective bargaining negotiations at *any* one airline are directly affected by, and also directly affect, negotiations *at all other* airlines." (App. 64a (emphasis added)). Petitioners never seriously contested this proposition. Rather, they argued that, as a matter of law, they could not be compelled to pay any collective bargaining costs incurred outside their respective bargaining units. That argument was put to rest by this Court's decision in *Lehnert*.

II. THE CHARGEABILITY OF LITIGATION COSTS WAS NEITHER PROPERLY RAISED NOR DECIDED IN THE COURTS BELOW.

Petitioners also ask this Court to review the court of appeals' refusal to consider the issue of whether ALPA's litigation costs at other airlines were properly chargeable to petitioners. The court of appeals declined to decide this issue because it "has not been properly presented and preserved below." (App. 10a). Even if this procedural ruling were wrong, it is hardly the kind of error that warrants review by writ of certiorari. In any event, we believe the court was correct.

Petitioners made no contention specifically directed to litigation costs either in their complaint, their arguments to the district court, or their initial brief on appeal. The issue was first discussed in the parties' *supplemental* briefs, which were filed at the request of the court of appeals at the rehearing stage, after this Court issued the *Lehnert* decision.

It is true that plaintiffs challenged ALPA's expenditures for the United and Continental strikes, and that some of those expenditures were for strike-related litigation. But petitioners' arguments did not differentiate between litigation expenses and all other expenses incurred outside their bargaining unit. Thus, neither ALPA nor the courts be-

low had any reason to believe that litigation costs, per se, were at issue. None of the cases cited by petitioners or by Judge Russell's dissent relieve a plaintiff of his normal obligation to identify, through appropriate pleadings and arguments, the legal and factual issues he wishes the court to consider and decide.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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